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LAWMAKING AS AN EXPRESSION OF SELF

George P. Fletcher*

We now take it as common ground that different economic and social circumstances generate different legal cultures. If a natural resource like water or oil is vital to the local economy, one would expect the emergence of legal rules and institutions to protect that resource against depletion. If people are interested in surviving, they will take measures to ensure their survival. On the social plane, if an institution such as friendship or the family is regarded as central, this commitment is likely to generate rules protecting the institution. Of course, the correlation between social forces and legal rules might not be precise. It might be the case, for example, that as family values decline, the rules of divorce remain strict as an expression of yearnings for times past. And if family values reassert themselves against a background of loose divorce rules, the law might not revert to its former strictness. If a social movement is deeply rooted, the law might indeed appear irrelevant as an instrument for guarding and furthering that movement.

As a general proposition, we can hardly quarrel with Holmes' aphorism that the life of the law has not been logic, but experience. The felt necessities of the time induce courts and legislatures to change the governing rules. So much is clear. The matter becomes murky, however, if we dig behind this platitude and we attempt to be more precise about the relationship between the base of economic and social circumstances and the superstructure of legal rules. The argument is that the base in some way generates or brings about the superstructure. Unfortunately, this causal proposition verges on truth by definition or tautology. It resembles the circular claim that a soporific condition causes one to be sleepy. To escape the charge of tautology, we have to be able to isolate the cause from its effects. We have to be able to perceive the soporific condition independently of the person's being sleepy. Since it is hard to imagine being sleepy without being in a soporific con-

* Professor of Law, Columbia University School of Law. B.A. University of California at Berkeley; J.D. University of Chicago, 1964; M.C.C. University of Chicago, 1965. This paper was prepared in conjunction with Professor Fletcher's appearance at Northern Kentucky University, Salmon P. Chase College of Law, to deliver the Harold J. Siebenthaler Lecture.

dition or being in a soporific condition without being sleepy, we can readily label this connection as circular and therefore tautological. Because they are true by definition, tautologies do not tell us anything about the real world. They are merely the expression of verbal interdependencies.

Those who claim that economic and social circumstances generate the superstructure of the law obviously believe that these social and economic circumstances can be identified independently of the legal institutions they generate. It is not so easy, however, to know whether a particular resource is important or whether a particular requirement is a "felt necessity of the time" without looking at legal institutions. In many situations, the perception of the base collapses into our perception of the superstructure. There is often no way of perceiving social values without looking at legal institutions.

Take the question whether human life is important in the United States today. We claim that human life is important, certainly much more important than property, but if we take a close look at our legal institutions we might wonder whether this is true. We need only note the dominant attitude in the United States toward capital punishment, toward abortion, toward the use of the automobile as our primary means of transportation. The primary evidence for assessing the value of human life in the United States today is indeed the law itself. Of course the legal institutions themselves are complex and there are contrary strains within the legal decisions themselves that reflect a greater concern for human life. Witness the increase in liability against bar keepers and social hosts who serve drinks to obviously drunk patrons and guests. These rules are designed to protect the innocent against drunk drivers.

Let me be clear about my claim. I am not arguing either that there is a high or low regard for human life in the United States, but rather that it is difficult to perceive what our attitude is without looking at the legal decisions that we make. If the consequence, namely the law itself, is the best evidence available for the felt necessities of our time, then it becomes tautological to claim that the social and economic needs generate legal institutions. When the cause collapses into the consequence, we have a logical pro-

2. Id.
There are obviously some cases in which social and economic upheaval induce significant legal changes. It is not particularly difficult to trace the impact of the Depression on Supreme Court decisions upholding interventions in the economy. Without attempting to assess the precise ways in which social and economic circumstances can induce a legal change, I should like to shift the focus of our thinking about law away from causal explanations toward an understanding of legal phenomena as the expression of meaning. The question that may prove to be more illuminating is not how did we get to where we are, but rather: What do the details of our legal system say about who we are? This is an important shift in orientation — from tracing events back to their causes to reading legal decisions as carrying implicit messages.

To follow through on the example of sleepiness, let us suppose that a lecturer confronts widespread yawning in his audience. He can ask himself a number of different questions. He can ask the causal question: What are the physiological circumstances that induce yawning? He can answer that causal question tautologically by saying that a soporific condition induces signs of sleepiness or he can answer the question by pointing to independent causal factors, such as the lateness of the hour or the lecture hall's being overheated. Another approach, the one that I favor in this lecture, stresses the yawning as an expression of meaning. What is the yawning person trying to tell the lecturer? The meaning of the yawn is sometimes painfully obvious.

In this lecture I should like to encourage an attitude toward legal phenomena that stresses both tradition and change as an expression of meaning, particularly as an expression of national legal identity. I will illustrate this thesis with some specific examples of substantive rules in American and in German law. In the latter part of the lecture, I shall turn to the choice of language as a parallel expression of identity within a particular legal system.

Allow me to begin with an example from the case law on the admissibility of involuntary confessions. We are all familiar with the Supreme Court's ruling in Miranda v. Arizona, which extended the constitutional privilege against self-incrimination to station-
house interrogations in the absence of counsel. The critical case in the evolution of the law is, in my opinion, Rogers v. Richmond,\(^5\) decided in 1961, five years before Miranda. In this case, Justice Frankfurter transformed the rationale for excluding involuntary confessions. The true reasons for excluding involuntary confessions, Frankfurter wrote, was not "because such confessions are unlikely to be true but because the methods used... offend an underlying principle in the enforcement of our criminal law."\(^6\) The question, of course, is what this underlying principle is if it is not conviction of the guilty and avoiding conviction of the innocent. In Frankfurter's statement of the principle, we find an expression of American identity. The important point, Frankfurter wrote, was that "ours is an accusatorial and not an inquisitorial system — a system in which the State must establish guilt by evidence independently and freely secured and may not by its own coercion prove its charge against an accused out of his own mouth."\(^7\)

The important feature of this argument is not whether the learned Frankfurter was correct about the essence of accusatorial or inquisitorial trials. He and his colleagues on the Supreme Court had an image — a screen memory, if you will — of medieval European inquisitorial trials. The nature of these trials was that the trier of fact sought to procure confessions as the means of establishing guilt. In the system of legal proof that prevailed on the Continent prior to the French revolution,\(^8\) it was important to secure confessions in cases where the formal rules of evidence would not permit a conviction. The evil in this procedure, as the Court perceived it, would extend to modern European accusatorial procedure. It makes little difference whether the inquisitorial judge seeks the confession or whether the independent prosecutor, functioning in an accusatorial system, seeks to gain incriminating evidence from the mouth of the accused. It makes little difference whether torture is used or not. The essential evil is the state's making an informal determination that there is sufficient evidence in the case to clinch the prosecution with a confession from the mouth of the accused. With this argument taken as a premise, it

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6. Id. at 541.
7. Id.
was but a short step to the Court’s ruling in *Miranda* that any interrogation of a suspect in custody in the absence of counsel or a knowing and explicit waiver of counsel is unconstitutional.

For our purposes, the intriguing issue is not so much the merit of the Court’s reasoning, but the role of the argument for an affirmation of identity. To reason as did Mr. Justice Frankfurter is to make a claim about what it means to be an American. Of course, there is an obvious paradox in arguments of this sort — for if it were truly the American way not to rely on confessions, there would be no need to resolve cases like *Rogers v. Richmond*. The argument about the American way is not an empirical claim about what the police do in fact. It is a claim about the essence of the American system of justice, not about its historical particulars. If the particulars of history belie the claim about the American system, so much worse for the particulars. They will pass as do all transient facts of history. Frankfurter’s argument in *Rogers v. Richmond* can be buttressed with arguments of principle and of policy, of justice and of utility, but at its core it is an argument of a different sort. Claims of principle should appeal to all judges graced with reason and a sense of justice. Arguments of policy should appeal to all people concerned about social welfare. Yet Frankfurter’s argument can appeal only to Americans and others who share the same historical experience. When a judge reasons that a particular decision is compelled by “our” system of criminal justice, his claim speaks only to those who identify with us and our system for trying criminals.

This style of reasoning is found in Continental jurisdictions as well as in the United States Supreme Court. Of course, the areas of law that express the affirmation of identity might well differ. A good example from the German case law is a 1951 decision of the Supreme Court in Criminal Cases. A German national, who had been reared in the Balkans and could neither read nor write German, was charged with incest for having had an illicit sexual relationship with his 17-year-old step-daughter. The sexual union was in fact prohibited under German law, but the defendant claimed that because he came from a different cultural background, he did not know that sleeping with his step-daughter was legally

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9. Decision of the Supreme Court in Criminal Cases, December 6, 1956, 10 BGHSt. 35.
10. StGB § 173.
incestuous. Under German law, he could in fact make out a complete excuse of mistake of law if he could establish that his mistake about the violation was free from fault. In view of the apparently different conceptions of incest, the defendant could plausibly argue that his ignorance of wrongdoing was unavoidable and therefore morally innocent.

The trial court convicted the defendant of incest on the theory that the same act of intercourse also constituted the criminal violations of adultery and of sexual exploitation of a dependant minor. He should have been aware, therefore, that he was engaged in wrongful sexual behavior. If this awareness of wrongdoing could be transferred from one crime to another, then it could plausibly be said that the defendant also knew that his incest was wrong. He was aware, generally, that the sexual act was both morally wrong and a violation of law. He was mistaken, simply, about whether the act constituted incest as well as other forms of sexual wrongdoing.

Transferring culpability from one crime to another is common in the Anglo-American tradition. The theory of transferred malice generates the felony murder rule, which takes the intent to commit an independent felony to be sufficient to convict of murder for killings occurring in the course of the felony. The German Supreme Court was fully aware that the trial court in this case relied on a theory that closely resembled Anglo-American doctrine. The German court rejected the American approach on the grounds that it was philosophically primitive. As the court reasoned: “German doctrine has overcome earlier theories which still prevail in Anglo-American jurisdictions, according to which it is sufficient if the actor’s intention is to commit any offense, regardless whether he intends to violate the specific legal interests that are actually violated.” Later in the opinion, the court bolstered its sense of being different from the Americans. Responding to a writer who urged that culpability could be transferred from one offense to another, the court quoted the distinguished philosopher Gustav Radbruch as saying, “It is but a short step from this view to the Anglo-American conception of intention and the principle of strict liability....” Recoiling against this possibility, the court revers-

11. StGB § 17.
13. 10 BGHSt. at 39.
14. Id. at 40.
ed the conviction for incest and developed the argument that the required awareness of wrongdoing must relate to the specific crime charged.

There is no doubt that German jurists take the theory of criminal accountability more seriously than do their Anglo-American counterparts. A revulsion against strict liability, against felony-murder, against utilitarianism, against Anglo-American insensitivity to the problems of just punishment — all of these are part of what it means to be a German criminal lawyer. German theorists invest extraordinary passion and a commitment to the refinement of substantive legal theory. Identifying with this edifice of principles and its immanent structure of values is a form of self-affirmation, precisely as identifying with the American system of criminal prosecution is an act of self-affirmation for American criminal lawyers.

Comparing this German case on mistake of law with Rogers v. Richmond, we should note a common feature of the process of self-affirmation in the legal decision-making. Both arguments build on a strong sense of the difference between self and others. In one case, the “other” is the European tradition with its inquisitorial mode of trial; in the German case, the feared “other” is the pragmatic American with his insensitivity to substantive criminal justice. I am not able to say whether the development of self in social interaction requires a comparable sense of superiority related to others, yet in the law, this attitude toward foreign systems appears to be an important feature of the process of discovering and defending the national spirit of a legal system.

This sense of superiority in the expression of legal identity is found not only in cross-cultural comparison, but in temporal comparisons drawn with a view to gaining distance from evils in one’s own history. One of the stock arguments of Anglo-American criminal jurisprudence is that particular institutions are tainted by association with the special procedures of the sixteenth century Star Chamber. The latest example is the Supreme Court’s opinion in Faretta v. California, which holds that, even in serious criminal cases, a defendant has the constitutional right to reject

15. For further elaboration of these premises of German legal thought, see Fletcher, The Right and the Reasonable, 98 Harv. L. Rev. 949 (1985).
counsel and proceed *in propria persona*. This is a holding that most German lawyers would regard as ill-informed, if not mad. Indeed, the Supreme Court musters few arguments for its view that our conception of human dignity requires that a criminal defendant be able to stand and fall on his own. Yet we do have the experience of the Star Chamber, which — at least according to the Supreme Court — used the institution of obligatory representation to enhance its persecution of criminal defendants." Reacting in part to this screen memory, the Court could conclude that having or not having a lawyer is a tactical decision that every criminal defendant should be free to make.

If the Star Chamber can have this impact after three centuries, one can imagine the contemporary uneasiness in West Germany with the living memory of National Socialist criminal justice. It is no accident that the West German Basic Law accentuates values such as the right to life, human dignity, the free expression of personality, the equality of the sexes as well as of all races, ethnic groups, and religions. The organicist positivism of the National Socialist era led to a revival of natural law in the post-war period. Overcoming the immediate past has been one of the preoccupations of German legal theory. In the field of protecting human life, in particular, the ghosts of all those murdered by the Nazis will haunt the administration of criminal justice for a long time to come.

The need to distance oneself from the evils of National Socialism proved to be one of the major determinants of a recent decision by the Federal Constitutional Court to invalidate a 1974 abortion law that permitted all abortions during the first twelve weeks of pregnancy. What is required under *Roe v. Wade* turns out to be constitutionally prohibited in West Germany. The court is fully aware that its decision departs from the trend in the United States as well as other countries in Western Europe. Yet by the court's own admission, it is "the historical experience and the moral, humanistic confrontation with National Socialism" that makes a difference in Germany. Germans are not free to decide the abor-

17. *Id.* at 821-22.
18. GG art. 2(2).
19. GG art. 1.
20. GG art. 2(1).
21. GG art. 3.
tion question as are other countries. The imperative to express a self different from that of National Socialists impels a decision at odds with the emergent Western toleration for abortion on demand in the early stages of pregnancy.

The problem with all arguments based on a reaction either to a foreign system or to a foreign past is that so much depends on how one perceives the alien experience. The fact is that the National Socialists developed a policy against, not in favor of, abortion; their concern was not so much the intrinsic value of the fetus, but the strengthening of the German Volk. This point is brought out effectively by the two judges dissenting from the ruling of the Constitutional Court. In view of these alternative readings of the Third Reich, one wonders about this process of self-affirmation in developing basic constitutional norms. There is an irrational element in lawmaking by distancing oneself from the past, and this irrationality is compounded by the inevitable disputes about the evil reacted against. With all these difficulties, however, there is no denying the critical role of self-affirmation in the evaluation of legal systems.

In the second part of this lecture, I should like to turn to the language of law as another vehicle for expressing the cultural identity of legal systems. Lawyers become attached, more than they realize, to particular phrases and doctrinal expressions as the means by which they affirm their cultural identity. The most striking example that comes to mind is the pervasive reliance on the term “reasonable” in the common law system. We routinely refer to “reasonable time,” “reasonable delay,” “reasonable reliance,” and “reasonable care.” In criminal law, we talk incessantly of “reasonable provocation,” “reasonable mistake,” “reasonable force,” and “reasonable risk.” In the variety of usage and diversity of doctrinal context, there is probably no term used more ubiquitously in the language of common law.

The pervasiveness of reasonableness in our discourse would hardly warrant notice if all legal systems relied, similarly, upon the concept of reason to express a central commitment of their culture. The fact is, however, that the language of the common law differs in this respect from every legal language with which I am familiar. French, German, and Soviet lawyers, for example, manage to make out legal arguments without relying upon

25. Id. at 68.
derivatives of the concept of reason. Their languages have a term for reason — raison, Vernunft, razumnost' — and these terms readily yield corresponding adjectives. Yet these parallels to our term "reasonable" do not figure prominently in legal speech on the continent. The French civil code uses the term raisonnable precisely once; the German and Soviet civil codes do not use the term at all. You can read the criminal codes of these various countries in vain in search of a term based upon the concept of reason. It is hard to imagine how these diverse legal cultures could conceptualize negligence without talking about reasonable care, but they manage to do so just fine. It is hard to imagine how they could talk about proof of guilt without invoking a phrase comparable to proof "beyond a reasonable doubt." Yet French, German and Soviet lawyers manage quite satisfactorily to express the requirements of conviction without invoking terms akin to "reasonable doubt."

These comparisons are not designed to suggest that our way of speaking is better or worse than Continental European patterns of discourse. My aim is simply to make us mindful that this is indeed the way we speak, and to suggest, further, that this way of analyzing legal problems expresses our image of ourselves as lawyers in the language of the common law. It is almost as though we could not function if we did not rely so pervasively on the unifying cement of reasonableness. Just imagine for the moment that the terms "reasonable" and "reasonableness" were banned from our language. How could we go about talking about negligence, about mistakes, about searches and seizures, and about proof of guilt without this essential word? If the word were banned, we would, no doubt, eventually find substitutes. But as we learned to speak differently about legal problems, we would invariably feel the loss. We would lose a significant component of our identity as common lawyers.

An anecdote might illustrate the importance of reasonableness to thinking like a common lawyer. Biblical Hebrew, and until recently, modern Hebrew, which is still close in its vocabulary and structure to Biblical Hebrew, lacked a term that could be readily translated as "reason" or "reasonable." That this is so tells us a great deal about the difference between Hebraic and Hellenistic

27. For further development of these points, see Fletcher, supra note 15, at 949-50.
cultures. The centrality of human reason comes to us from the Greeks and their philosophic aspirations. Hebraic culture relies on practice — and less significantly on reason — as the source of wisdom and understanding. If we had to pick one word as the translation of reason into Hebrew, it would presumably be the esoteric term *tvunah*, which derives from the root that means understanding. This is a term used to translate, for example, Kant's *Critique of Pure Reason.* But the term is too high-brow to have much of an impact on common speech.

The absence of a term for reason raised some difficulties for the Imperial British who, in 1936, imposed a version of Stephen's Model Criminal Code on their colonial subjects in Palestine. The official draft of this 1936 criminal ordinance was in English, but it was obviously necessary to translate the ordinance into Hebrew, the language of the courts. As one would expect, the term reasonable appears throughout the code. Translating the term must have been a headache for the translators, for as I have suggested, there was at that time no precise, readily understood equivalent in modern Hebrew. The lawyers were unhappy. It would just not do to have a legal system modeled after the English common law that did not rely prominently on the term “reasonable.” As I am told by Shalev Ginossar, a former judge and professor emeritus in Jerusalem, a group of lawyers of the infant state convened one day in the justice department where they decided that something had to be done to fill in the gap in their legal language. Israelis in all walks of life were then making up terms to adapt Biblical Hebrew to modern conditions. Why not make up a new term that would become the Israeli legal equivalent of reasonableness? The lawyers cast about their language and came up with the word *savir* as the appropriate term to use every time an English lawyer says reasonable. Thus a whole new set of phrases was fathered. It became acceptable in Hebrew to speak about a mistake or a doubt or grounds or a time that was *savir* or reasonable. The root for the term *savir* does not mean reason, but rather “to think,” “to surmise,” or “to have an opinion.” Were it not for the artificial designation of this term as the Hebrew equivalent of reasonable, no one would come upon the use of *savir* as an adjective describ-

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29. I. Kant, *Critique of Pure Reason*. 
ing mistakes or grounds or the amount of care required not to be negligent.

A curious thing has happened since the lawyers coined this expression and the new set of phrases came to be embedded in all subsequent legislation. The word savir has moved from the artificial language of legislation into the language spoken on the streets. The appropriate way to ask whether a price is reasonable was once to inquire whether the price is one that “presents itself to the mind.” Now the common phrase in spoken Hebrew is whether the price is savir.

Why was it so important for Israeli lawyers to coin a single term that could be used every time the word reasonable is used in English? One might say because it is more convenient to have a single term instead of a number of different expressions. But this answer presupposes that the speakers perceive the underlying unity among these diverse expressions. In French, German, and Soviet law, one similarly finds a variety of expressions used to translate the term reasonable. Lawyers in these systems do not sense that the multiplicity of terms represents a fracturing of a single concept; for them, the concepts are multiple rather than variations on the same theme. Israeli lawyers responded differently because they worked within a legal system that relied extensively on English materials, they all spoke English fluently or nearly fluently, and they wanted to think of themselves as carrying forward the English common law. Coining a term and relying on that term became a central expression of Israel's place in the family of common law legal systems.

Reasonableness is not the only term in English that plays this distinctive role. There are other usages that locate lawyers in the orbit of those nurtured on English as their legal language. Think for a minute about the term “policy.” In discussing the law and law reform, we rely heavily on this term. One of the first clichés that law students learn is the answer: “The court decided this way as a matter of policy.” We distinguish, seemingly, between the positive law, which is enacted and fixed, and policy objectives, which are unwritten but nonetheless embedded in our legal culture. Various policies, such as deterrence in the criminal law, risk distribution in the law of torts, and facilitating transactions in con-

30. See materials cited in Fletcher, supra note 15, at 950 nn. 2-8.
tracts, seem to stand beyond the unseemly fray of politics. Yet the terms policy and politics derive from the same root. By a stroke that we would have to regard either as genius or self-deception, the evolution of our language enabled us to think of policies as clean and politics as dirty. Little do we realize, however, that lawyers in other legal systems have a great deal of difficulty understanding what we mean by policy and translating this term into their language. They are stuck with only one word for both policy and politics, and therefore they do not pick up the distinction between the clean and the dirty that we invest in this distinction. A term has crystallized in contemporary German usage that enables legal theorists to distinguish between politics and policy, but the term has an artificial ring. Theorists combine the term for law with the term for politics, yielding rechtspolitisch, thus distinguishing legal politics from ordinary politics.

Note the critical difference between our reliance on the term reasonable and our attachment to the distinction between policy and politics. The term reasonable lends itself to translation in virtually every other Indo-European language. We choose to rely upon the term reasonable, and lawyers in Europe choose the opposite. In contrast, the very existence of the term policy distinguishes our legal language. For European lawyers, the problem is not whether they should invoke a term they already have, but whether they should devise a term that captures what we mean when we talk about policy.

English legal discourse is replete with technical terms, such as "estoppel" and "consideration," that do not lend themselves readily to translation into other legal languages. When the terms are expressed in Latin, as is the case with certiorari and habeus corpus, we can guess that translation into a foreign language will be difficult; translation into English itself is a stumbling block. In some of these cases, the difficulty of translation is simply an inevitable fact of distinct linguistic experience.

Sometimes, however, the non-translatability of a term points to a distinctive feature of our history or the structure of our legal discourse. There is no way to translate the terms "equity" and the equitable institution of the "trust" into European legal languages for none of these systems recognizes the distinction between law and equity, between legal and equitable ownership. Of course, there are analogues to the trust in various jurisdictions,
but they are based upon concepts of contract, rather than the bifurcation of the property interest.31

The nontranslatability of policy is illuminating in a different way. The term does not point to a special feature of historical experience, but rather to a prominent feature in the structure of our discourse. Why, indeed, have we cultivated the distinction between policies that are beyond question and politics, the methods of which are always subject to question? What need does the term policy fill in our own language? I submit that one of the reasons we rely so heavily on the concept of policy is that we lack a term in English to express the notion of law as a set of unwritten, enduring principles binding upon us by virtue of their intrinsic merit. Blackstone thought of the common law in this way, but in the course of the nineteenth century our thinking about law became so heavily dependent upon judicial and legislative enactment that we have lost our sense for law as an enduring body of principles. Europeans retain the distinction between law as principle and law as enactment by distinguishing in their language between two sets of terms for law. In German the distinction is between Recht and Gesetz, in French between le droit and la loi, in Spanish between el derecho and la ley. Normative ideals of the legal system are expressed by relying upon the first of these ordered pairs. The notion, for example, of the rule of law is always expressed by choosing the term that means law as a body of enduring principles, for example, as in the terms Rechtstaat or la règle de droit. We lack a term for law that points clearly to the higher dimensions of justice and order that make the rule of law something more significant than the law of rules. As a result, we rely heavily on policy as a surrogate expressing the higher dimensions of value in our thinking about governing by law.

The pervasive influence of reasonableness on our legal culture might also fill the gap left by the absence of a concept of Recht or droit in our legal thinking. Both terms, policy and reasonableness, are indisputably normative. The legislature can never say definitively what constitutes the guiding policies of our society, nor can it ever specify what shall constitute reasonableness in a particular context. These standards transcend the enacted, written legal materials. They always require a judgment of value that goes beyond what we read in the lawbooks.

31. See C. de Wulf, The Trust in Civil Law 27 (1965) (trust "without parallel in the Civil Law").
My thesis is that our gravitating toward particular words and concepts reflects our consciousness of being lawyers in the common law tradition. Unlike Israeli lawyers who chose to develop a concept of reasonableness in their legal language, we use the basic terms of our language without reflecting on the way in which they make us different from lawyers in other traditions. We are hardly aware that our pervasive reliance on reasonableness and on policy says something about the structure of our thinking about law. Perhaps this point shall count as a criticism of the general argument that the choice of language expresses our national legal identity. If the use of language is unwitting, if we are not aware of the way in which our choice of words makes us distinctive, then arguably the use of language does not serve the function of self definition.

You will recall that the American rejection of the inquisitorial system and our firm belief that everyone has a right to defend himself, even in a capital case, self-consciously distinguishes us from the European legal tradition. Similarly, the Germans' rejection of strict liability in the criminal law self-consciously distinguishes them from what they take to be the primitive features of Anglo-American jurisprudence. The contemporary West German stand on abortion self-consciously distinguishes them from what they take to be the National Socialist attitude toward human life. All of these legal positions serve to define the respective legal culture in contrast to others.

The commitment to particular forms of language may serve this function only if the commitment is self-conscious, that is, only if the lawyers are aware that their mode of speaking is distinctive. Of course, it is typically the case that lawyers self-consciously speak differently from the lay public. This choice of a special lexicon fulfills the need for differentiation from untutored lay people. This proposition holds clearly with respect to arcane Latin expressions, yet not quite so clearly with regard to basic terms like "reasonableness" and "policy."

In the field of comparative law, the study of language and language transplants proves to be essential in understanding the self-definition of language systems. When the Japanese sought to enter the Western legal world in the late nineteenth century, the first thing they did was generate a whole new vocabulary in order to talk about law in the way in which Europeans, particularly Germans, cast their arguments. Embarrassed by not having a word for individual "rights" in their language, they created a new word
— precisely as the Israelis created a new word to express the concept of reasonableness. Also noting that they did not have a vocabulary of abstract terms to talk about legal theory, the Japanese translated wholesale a range of concepts that the Germans developed in the nineteenth and early twentieth centuries. After World War II, American influence was felt more strongly, particularly in the drafting of the new Japanese constitution. Eager to reflect American influence in their vocabulary, Japanese lawyers now talk about the constitutional issues of "due process." The conclusions that Japanese lawyers and judges draw from these transplanted terms and concepts are probably not as important as the commitment to this language as an expression of their attachment to Western jurisprudence.

In these examples, drawn from the Israeli and Japanese experience, I have stressed the translation of legal concepts as a way of expressing adherence to a foreign tradition. We should not underestimate, however, the power of language as a barrier between legal cultures. This is most noticeably the case in those jurisdictions, such as Quebec and South Africa, where the conflict between the common law and the civil law is expressed, as well, as a linguistic conflict. In both of these cases, the common law is expressed in English; French and Dutch are reserved for expressing civilian legal ideas. Without this difference in language, I would submit that the common law and civil law traditions would quickly amalgamate. My sense is that in Louisiana, which no longer has the French language as an anchor for the civilian tradition, the fusion of the two legal cultures is inevitable. The differences between case law and codification tends to disappear in every developed legal system. But differences anchored in a different idiom and a different mode of self-expression endure despite virtually every form of social and economic change.

What is the moral status of these arguments expressing cultural identity in law-making? How do they rank with arguments of justice? Of principle and policy? Of efficiency? Are they, in any sense, moral arguments? As detached observers of our own and foreign legal systems, we can readily identify these arguments as frequent occurrences. As participants in legal debate, however, we should have serious reservations about seeking to affirm ourselves — or to affirm what we think our tradition has made us — in solving serious conflicts, such as the asserted right to an abortion, the asserted right to represent oneself in a felony trial, and the issues
of culpability and strict liability in the criminal law. All legal traditions as well as our identity within those traditions vacillate in flux. Solving a problem by self-affirmation renders our moral judgment hostage to a self-serving perception of the past. We should indeed turn the inquiry around. We should constantly test our tradition for its principled soundness. The life of the law may be experience, but our experience rings hollow unless tested, in every decision, against the rule of reason.
ON THE CONSTITUTIONALITY OF KENTUCKY'S MINERAL DEED ACT

Karen J. Greenwell*

In 1984, the Kentucky General Assembly enacted legislation that purports to solve the long-standing problems regarding the Broad Form Deed. House Bill 32 was codified as Kentucky Revised Statute 381.930, .935, .940, and .945, effective July 13, 1984, and was collectively titled the Mineral Deed Act. Kentucky Revised Statute 381.930 to 381.945.

1. For a resume and analysis of the Broad Form Deed problem and the legal principles involved in it, see Caudill, Kentucky's Experience with the Broad Form Deed, 63 KY. L.J. 107 (1974-1975).

2. KY. REV. STAT. §§ 381.930-381.940 (Bobbs-Merrill 1984).

The purpose of KRS 381.935 are as follows:

1. To facilitate and require the demonstration of a clear understanding between the owners of surface and mineral estates in land concerning their respective rights to use and occupy or injure the surface of the land;
2. To protect the security of titles to land and improvements thereto;
3. To promote the free alienability of land;
4. To prevent hardship and injustice to surface or mineral owners arising from uncertainty of the law;
5. To promote the conservation and the full and efficient use of all natural resources of the state, including the land, the making of improvements to the land, the growth of agriculture, the development of new industry and the general economic well-being of the state and its people;
6. To codify a rule of construction for mineral deeds relating to coal extraction so as to implement the intention of the parties at the time the instrument was created; and
7. To foster certainty and uniformity in the operation of the law.

HISTORY: 1984 c 28, § 1. eff. 7-13-84

381.935 Definitions
For the purpose of KRS 381.940, "method" and "methods" mean underground, surface, auger, or open pit mining and nothing in KRS 381.940 shall be interpreted to adversely affect the use of modern equipment or machinery with respect to mining methods permitted under KRS 381.940.

HISTORY: 1984 c 28, § 3. eff. 7-13-84

381.940 Rules of construction for mineral deeds relating to coal extraction
In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods...
Statute 381.930 lists seven purposes of the legislation while Kentucky Revised Statute 381.940 is the operative part of the Act. This latter statute places special evidentiary requirements on some holders of mineral interests. Under this statute, if a mineral interest is created by a deed or lease that is either silent as to the method of coal extraction to be used or that subordinates the surface estate to the mineral estate, it will be presumed that the parties intended that the coal be mined only by the methods known and in use in that area at that time. In the case of broad form deeds that were executed primarily during the early 1900s, this would limit a mineral owner to removing coal by deep-shaft mining. A mineral owner can overcome this presumption by presenting "clear and convincing evidence" that the parties intended otherwise. This legislative interpretation of the contracts by which the mineral owners took their interests reverses a long line of judicial decisions.

As early as 1916, Kentucky's highest court in *Blue Grass Coal Corp. v. Combs* determined that a lease that gave the mineral lessee an unfettered right to mine made the surface servient to the mineral estate. "[T]he company's right to use the surface, insofar as it is reasonably necessary to efficiently carry on its mining operations, is paramount to that of the defendants [the surface owners]. . . ." A few years later, in *McIntyre v. Marion Coal Company*, the court interpreted a deed of minerals that gave the mineral owner the right to use the land in its mining operation as it deemed "necessary or convenient." At the same time, though, the deed specifically reserved the surface rights to the grantor. The court again held that under such a severance, "[T]he mineral estate under the deed is dominant, superior, and exclusive in every circumstance or condition where the owner thereof shall deem it necessary or convenient to meet such use of the surface as deed allows." In
the court’s interpretation, the broad grant of rights to the mineral owner would even allow the exclusion of the surface owner so long as compensation was paid for any surface improvements that were destroyed.

Undoubtedly, under the plain terms of the deed, the Marion Coal Company has the right and could by showing the necessity or convenience thereof use and occupy the whole surface of the land in question even to excluding the plaintiff and taking his house and garden, but such taking would have to be after satisfaction or adjudged compensation for such improvements. . . .

The court recognized the harshness of its holding. It refused, however, to examine the wisdom of the grantor's action in making the deed and severing the minerals in such a way, and construed the deed according to its terms.

In Rudd v. Hayden, almost fifty years ago, the court determined that a deed that conveyed minerals to be mined intended more than simply removal by the deep-shaft method. In this case, limestone was being quarried under the deed and the surface owner objected to that method of removal as not being covered by the conveyance. The court in this case took a very broad view of what constitutes "mining." "Furthermore, the term 'mined' is not limited to those cases where a shaft is sunk into the ground, but may include 'open cut,' 'stripped,' or 'hydraulic' methods of mining.... There could be no possible reason for sinking a shaft to obtain minerals found on the surface." This, then, was to a certain extent the first Kentucky strip-mine case.

The first coal strip-mine case was Treadway v. Wilson. In that case, in 1907 the fee owner had conveyed all of his mineral interests along with some surface rights and "all easements necessary in mining and removing all said mineral." In 1945, the mineral owner proposed to remove coal from that property by the strip-mining method. The surface owner objected and the mineral owner sued for a declaration of rights. The court, looking to previous cases adjudicating the respective rights of surface and mineral owners, found the mineral estate was dominant and the mineral owner could

9. Id.
11. Id. at 37.
12. Treadway v. Wilson, 301 Ky. 702, 192 S.W.2d 949 (1946).
13. Id. at 949.
use the surface for any purpose (including, by implication, strip mining) so long as it was not done "oppressively, arbitrarily, wantonly, or maliciously."\(^\text{14}\)

The question of a mineral owner's right to strip mine was squarely and finally decided in *Buchanan v. Watson.*\(^\text{15}\) The deed involved in this dispute was made in 1903 to John C.C. Mayo—an archetypal broad-form deed. The deed severed the mineral estate, granted all mineral rights to Mayo, and waived any claim of damages against the grantee. The Chancellor found that the only feasible and economical way to mine the coal on that land was to strip it. He also found that such mining would destroy the surface. The surface owners argued that surface mining was not contemplated by the parties at the time of the deed and, therefore, to strip mine would be a violation of the surface owner's rights. The deed was silent as to the method of mining to be used. The court held that, although the parties may not have specifically contemplated strip mining, the mineral deed gave the grantee the right to remove all the mineral.

It seems clear that the parties intended the conveyance of the coal. To deny the right to remove it by the only feasible process is to defeat the principal purpose of the deed.

We think the Chancellor correctly decided that since the appellant had the right to remove all of the coal in, on, and under the surface of this tract, the particular method contemplated by the parties (in the absence of language prohibiting other methods) does not preclude him from utilizing the only feasible process of extracting coal.\(^\text{16}\)

The court went on to determine when a mineral owner who strip mines can be held liable for damage to the surface estate. To answer this question, the court focused on the waiver of damages clause contained in the deed. The court upheld the validity and enforceability of the waiver of damages clause and found that the mineral owner is only liable in damages when the surface is destroyed arbitrarily, wantonly, or maliciously.\(^\text{17}\)

Interestingly, the court, like the 1984 General Assembly, was concerned about the certainty and uniformity of mineral titles and the hardship that uncertainty could cause.\(^\text{18}\) Speaking of the mineral

\(^{14}.\) Id. at 950.
\(^{15}.\) Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956).
\(^{16}.\) Id. at 42-43.
\(^{17}.\) Id. at 43.
\(^{18}.\) Id. at 43, 44; KY. REV. STAT. § 381.930 (2), (3), (4), (7). (Bobbs-Merrill 1984).
owner's right to use the surface unless the use is arbitrary, wanton, or malicious, the court said:

[T]he rule has become so firmly established that it is a rule of property law governing the rights under many mineral deeds covering much acreage in Eastern Kentucky. To disturb this rule now would create great confusion and much hardship in a segment of an industry that can ill-afford such a blow. It is especially desirable that the law of property rights should remain stable after it has been settled. 19

This survey of a few of the cases adjudicating the respective rights of mineral and surface owners shows that the question has been largely settled since 1916, and as to the strip mining of coal, since 1946. The Buchanan position was reaffirmed in 1968 in Martin v. Kentucky Oak Mining, 20 and has not been judicially abrogated.

The 1984 General Assembly, through The Mineral Deed Act, attempted to change this relationship between the surface and mineral estates that the courts have determined was the intent of the parties. Kentucky Revised Statute 381.940 seeks to determine legislatively what the parties intended. It makes the surface estate dominant as to all mining done by methods not used in the area at the time of the severance unless the deed specifically mentions the method. 21 By changing the settled interpretation of these severing instruments, however, this statute has the effect of denying mineral owners the rights for which they contracted—or at least those for which the courts have determined that they had contracted.

A statute that attempts to readjust property rights by reinterpreting past contracts poses a number of constitutional questions. Such a statute may be challenged on at least three constitutional grounds: (1) it is retroactive legislation, (2) it violates the contract clause, 22 and (3) it is a taking of property without compensation in violation of the fifth and fourteenth amendments. 23 This paper will examine each of these constitutional challenges to the Kentucky Mineral Deed Act.

19. Buchanan, 290 S.W.2d at 43-44.
20. Martin, 429 S.W.2d at 395.
22. U.S. Const. art. I, § 10 provides that “no state shall ... pass any ... law impairing the Obligation of Contracts ...”
23. The fifth amendment provides in part: “nor shall private property be taken for public use, without just compensation.”

The fourteenth amendment provides: “nor shall any state deprive any person of life, liberty, or property without due process of law.”
I. RETROACTIVE LEGISLATION

A retroactive statute is one that changes the legal effect of conduct that occurred prior to the enactment of the legislation. "The most obvious kind of retroactive statute is one which reaches back to attach new legal rights and duties to already completed transactions." Kentucky Revised Statute 381.940 falls into this category. It is, by its very terms, retroactive legislation of the most obvious type. It purports to give a statutory construction to all instruments that sever the mineral and surface estates "heretofore or hereafter executed." The prejudice against the enactment of retroactive legislation is ancient. One commentator traces its roots to a provision in the Roman Code that required laws to be construed prospectively. This rule of construction was carried over into English law and thence to the United States. In the United States, though, the rule of construction developed into a restraint on the enactment of legislation as well. This development gave rise to the constitutional ban on ex post facto laws. The decision in Calder v. Bull, however, limited the application of the ex post facto clause to criminal laws, and thus removed any specific constitutional prohibition against retroactive civil legislation.

While Calder v. Bull may have removed the formal articulation of the policy against retroactivity, the underlying reasons for it remained. Charles Hochman, in his article on the subject, cites three primary reasons for the objections to retroactive legislation. These are basically (1) reliance—the need to be able to plan one's activities knowing their legal consequences, (2) stability—the need to have past transactions remain static, and (3) fairness—retroactive legislation can be manipulated more easily to serve private purposes since it is known who will benefit from or be injured by it. Retroactivity alone, however, is not a sufficient con-

26. Id. at 541.
27. U.S. CONST. art. I, § 10 provides that "No state shall ... pass any Bill of Attainder, ex post facto law, ... ."
30. Id. at 692.
31. Id. at 693.
32. Id.
stitutional basis for finding a statute invalid. "[I]t has long been accepted that retroactivity is a ground for holding a statute void only if it contravenes a specific provision of the Constitution."33 Thus, the threshold question is whether the retroactivity of the statute causes it to violate the contract clause,34 the fifth amendment taking clause, or the fourteenth amendment due-process clause.35

The challenges to statutes based on a claim that their retroactivity violates the due-process clause fall into four main categories: (1) emergency legislation, (2) curative statutes, (3) taxing legislation, and (4) general legislation.36 Since the Supreme Court tends to treat each of these challenges differently, it is important to determine into which class Kentucky’s statute fits. Kentucky’s Mineral Deed Act lists seven purposes for the legislation—among them are protecting land titles and ensuring the alienability of land.37 None of these seven purposes includes, specifically or by implication, an element of emergency. Nor is this legislation a curative statute within the meaning of that category of due-process challenges. "Curative statutes are those measures that will either ratify prior official conduct or make a remedial adjustment in an administrative scheme."38 A statute of this kind was at issue in F.H.A. v. The Darlington, Inc.39 In that case, the Supreme Court upheld the codification of a Federal Housing Administration policy against financing mortgages on rental property even though it affected some mortgages guaranteed prior to the statute. The Mineral Deed Act is not that kind of statute since it relates neither to an administrative scheme nor to prior official activity. The Act is also not a taxing measure and, therefore, it does not come within the third category of challenges—taxing regulations.

The Mineral Deed Act comes closest to fitting within the fourth category—general retroactive legislation. The threshold question that the Court determines is whether the statute’s retroactivity affects a right or remedy.40 If it affects a remedy, the statute

33. Id. at 694.
34. See supra note 22.
35. See supra note 23.
37. See supra note 2.
38. Nowak, supra note 36, at 473.
is generally sustained. If it directly affects property rights, however, it is subject to closer scrutiny. One of the more recent cases of this type, Usery v. Turner Elkhorn Mining Co., 42 indicated that the scrutiny is not particularly strict. In Usery, the Court upheld legislation that provided black-lung benefits to former miners and placed some of the financial burden for those benefits on the miners' former employers. The operators were requested to pay benefits to miners who had left their employ before the effective date of the Act. To this extent, then, it was retroactive and was challenged by the operators on this basis. In evaluating the statute under the due-process clause, the Court gave great deference to the judgment of the legislature and looked only for a rational relationship between the statute and its legislative purpose. 43 If there is a rational relationship then it seems the statute will be upheld. A claim that a statute violates the due-process clause because of its retroactivity is a relatively weak constitutional challenge. An analysis of the Mineral Deed Act under the contract and taking clauses is much more productive, especially in view of the renewed vitality that the Court has given to these clauses in recent years.

II. THE CONTRACT CLAUSE

"Today the [contract] clause is of negligible importance, and might well be stricken from the Constitution. For most practical purposes, in fact, it has been." This is one commentator's expression of the disuse and low esteem into which the contract clause had fallen. Though perhaps an overstatement, there is some truth to his assessment. When this comment was published in 1974, the contract clause had not been used to strike a statute since 1941. 46 In 1977 and 1978, however, the Court resurrected the contract clause in United States Trust Company v. New Jersey 47 and Allied Structural Steel v. Spannous. 48 In these two cases, the Court expanded the scope of the

41. NOWAK, supra note 36, at 475.
43. Id. at 18, 19.
44. U.S. CONST. art. I, § 10.
45. CHASE & C. DUCAT, CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY 105 (1974 ed.).
analysis and power of the contract clause, and construed it as a significant limitation on the states' legislative activity. In both cases, the Court struck the legislation being challenged.

To demonstrate what a departure the Court's interpretation of the contract clause in United States Trust and Allied was from its prior use of the clause, some background is in order. Far from being "of negligible importance," in the early years of this country, the contract clause was the most widely used means of protecting individual property rights against state regulation.49

Before 1889 the Contract Clause had been considered by the Court in almost 40% of all cases involving the validity of state legislation. So successfully was its protection invoked that it was the constitutional justification for 75 decisions in which state laws were held unconstitutional, almost half of those in which legislation was declared invalid by the Supreme Court.50

The contract clause was enacted against a background of economic depression. In response to the plight of their debtor citizens, state legislatures enacted "an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligation."51 Because these legislative interferences undermined the right of creditors to collect on debts, public confidence in the market system declined. This curtailed extensions of credit which, in turn, hampered trade. The contract clause, then, was an attempt to stabilize the debtor-creditor relationship by preventing legislative interference. This situation was described by Chief Justice Marshall in his dissent in Ogden v. Sanders.52

The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all and destroys all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private fate. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as

52. Id. at 427. These state laws that abrogated creditors' rights and relieved debtors are chronicled in The Federalist, no. 44 (Madison).
the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.

Early interpretations of the contract clause extended its application beyond debtor-creditor agreements. In *Fletcher v. Peck*, the first case to interpret the contract clause, the state was a party to the contract involved. It was not a debtor-creditor question but rather, grew out of the Great Yazoo Land Scandal and involved an attempt by the state to rescind land grants which had been obtained by bribery. Again, in *Dartmouth College v. Woodward*, the state was a party to the contract. There, the Court held that the corporate charter that the state had granted to Dartmouth College was a contract. As such, the state could not alter the charter at its will without violating the contract clause.

In the late Nineteenth Century, the importance of the contract clause began to wane as the Court started to base its adjudication concerning the states on the due-process clauses of the fifth and fourteenth amendments. This was the heyday of substantive due process, a theory that allowed the Court to make independent determinations as to the validity of the legislative purpose and the reasonableness of the means employed to achieve that purpose. When the contract clause was employed during this period, the Court's analysis was very similar to that of substantive due process. In the 1930s, substantive due process gave way under the pressure of the Depression. When the Court adopted its current theory of deference to the determinations of the legislature for purposes of due-process analysis, it was extended to the contract clause analysis as well.

However, in 1977, when in its decision in *United States Trust Company*, the Court used the contract clause to strike a statute for the first time in nearly thirty-six years, it was not to the current due-process (or even contract-clause) analysis that it turned, but rather to the tests and method of analysis set out in *Home Building and Loan Association v. Blaisdell*—a product of the ear-

56. *Id.* at 641.
59. *Id.*
ly 1930s. *Blaisdell*, according to Justice Blackmun in *United States Trust Company*, "is regarded as the leading case in the modern era of Contract Clause interpretation." An analysis of some of the major contract-clause cases that were decided between *Blaisdell* and *United States Trust* is helpful in understanding the scope of the new contract clause tests that the Court created. This is especially true since it is the *United States Trust/Allied Steel* test by which Kentucky's Mineral Deed Act must be judged.

### A. Blaisdell

*Home Building and Loan Association v. Blaisdell*64 involved a challenge to the Minnesota Moratorium Law65 as violative of the contract clause. The statute was enacted in 1933 as a relief measure for mortgagors during the Depression. The Minnesota legislature declared an economic state of emergency and provided a judicial means by which mortgage foreclosures and sales could be postponed and the period of redemption lengthened. The act was temporary—it was to remain in effect only until the abatement of the emergency or until May 1, 1935, whichever came first. If upon the mortgagor's application an extension of the foreclosure or redemption period was granted, the mortgagor in possession was required to pay a reasonable rental to the mortgagor.66

The state conceded that the statute impaired the mortgage contracts that it affected. It argued, however, that in light of the emergency situation, the enactment of such a relief statute was for the protection of the public welfare and therefore was authorized by the state's police power.67

The United States Supreme Court, then, was faced with the question of the relationship between the general command of the contract clause—"no state shall . . . pass any . . . law impairing the Obligation of Contracts . . ."68—and the power of the state to act in an emergency to protect the public health and welfare. The Court began with the proposition that the existence of an emergency

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64. 290 U.S. 398 (1933).
65. 1986 Minn. Laws 339.
67. Id. at 409.
could not confer any new power on the state. It might, however, provide the opportunity for the state to exercise the powers reserved to it.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.

While emergency does not create power, emergency may furnish the occasion for the exercise of power . . . the constitutional power created in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular questions.\(^9\)

In reviewing past decisions construing the contract clause, the Court determined that the generally stated prohibition of the contract clause was not absolute. "To ascertain the scope of the constitutional prohibition we examine the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."\(^{70}\) Rather, it is subject to qualification by the state's police power to protect the public interest, just as the state's police power is restricted by the contract clause.

The state, concluded the Court, retains two kinds of control over contracts. First, it has the power to control the remedies for breach of the contract so long as it does not create a total lack of remedy that would make the contract valueless. In addition, the state retains the power to protect the public interest. "Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people."\(^{71}\)

Under the aegis of this police power, the Court had previously sustained public interest legislation that outlawed lotteries,\(^{72}\) alcoholic beverages,\(^{73}\) and public nuisances,\(^{74}\) even though such legislation interfered with existing contracts. The conflicting

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69. Blaisdell, 290 U.S. at 425, 426.
70. Id. at 428.
71. Id. at 434.
demands of the contract clause and the state’s police power, then, must be interpreted together and balanced. “The reserved power [of the states] cannot be construed so as to destroy the limitation [of the Contracts Clause], nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other.”

The Court interpreted this rule of harmonization to permit the states to enact “limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake.” To this list of exigencies the Court added economic crises.

The Court, in applying these criteria to the Minnesota Mortgage Act, made its own determination of the existence of the emergency and of the reasonableness of the means the state legislature had chosen to meet it. First, an emergency had been declared by the state, and the Court had, by judicial notice, confirmed its existence. Second, the legislation was enacted to meet a general social problem and “was not for the mere advantage of particular individuals.” Third, the means by which the state met the problem were well-tailored to the situation. Fourth, the conditions imposed by the legislation—the means to a legitimate end—were not unreasonable.

Here the Court noted that the statute did not destroy the contractual obligation, but merely temporarily suspended the enforcement of it. Also, the mortgagee received some compensation, in the form of judicially determined rents, which served as a kind of interest on the debt that the statute suspended. Under this factor, the Court, in effect, determined for itself the reasonableness of the terms of the legislation. “If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the state’s protective power, this legislation is clearly so reasonable as to be within the legislative competency.”

75. Blaisdell, 290 U.S. at 439.
76. Id.
77. Id. at 442.
78. Id. at 444.
79. Id. at 445.
80. Id.
81. Id.
82. Id. at 447.
The fifth and final factor the Court adduced was that the legislation was temporary. The existence of an emergency or reasonableness alone, would not, according to the Court, validate legislation. Thus, the *Blaisdell* Court created a very stringent test by which state legislation was to be measured. Only temporary, reasonable, limited regulations designed to meet a specific, verified emergency would withstand a contract-clause challenge.

In the years following *Blaisdell*, the stringency of this test was significantly weakened. During that period, substantive due process was officially rejected, and the Court adopted a policy of deference toward determinations of state legislatures about the legitimate ends and reasonable means of their legislation. By 1965, when the Court decided *City of El Paso v. Simmons*, the last contract-clause case before *United States Trust Co. v. New Jersey* was decided in 1977, the five factors developed in *Blaisdell* were totally forgotten.

The legislation involved in *El Paso* reduced the period during which purchasers of state land could redeem it after forfeiture. Texas had, in 1910, sold public lands pursuant to a statute authorizing long-term installment contracts under which purchasers would forfeit the land if they did not pay the interest on the sale price. The forfeiture was automatic, but the purchaser or the purchaser's vendee could redeem the land at any time simply by paying the accrued interest. In 1941 this statute was amended to shorten the redemption period to five years from the date of the forfeiture. Simmons bought land from a seller whose claim had been forfeited for more than five years. Under the 1941 statute his attempt to redeem the land was refused. The land was later sold to the City of El Paso, and Simmons sued to settle the title.

The city first argued that changing the redemption period did not affect the contract rights involved. The five-year limitation was merely an adjustment in the remedy and therefore was within the permissible scope of state police power actions. Further, the city focused on the important public purpose of the legislature. The 1941 statute was designed to end the litigation caused by the indefinite redemption period which had encouraged speculators to

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83. NOWAK, supra note 36, at 467-68.
85. United States Trust, 431 U.S. 1.
buy and then forfeit the land with the intention of redeeming it should oil or gas be discovered on it. This eternal possibility of redemption by any former purchaser was a significant cloud on the title to that land. As a result, the repurchase acts were an attempt to bring some stability to the state's land titles. "The general purpose of the legislation enacted in 1941 was to restore confidence in the stability and integrity of land titles and to enable the state to protect and administer its property in a business-like manner."\textsuperscript{86}

In assessing the validity of this purpose and the reasonableness of the means used by the state legislation, the Court made no mention of the strict test developed in \textit{Blaisdell} or its five factors. Indeed, the Court gave great deference to the state's own determinations on these issues.

The state has the "sovereign right ... to protect the ... general welfare of the people... Once we are in this domain of the reserved power of the state we must respect the 'wide discretion on the part of the legislature in determining what is and is not necessary.'"\textsuperscript{87}

The Court upheld the legislation as serving an important state interest and balanced the magnitude of that interest against the minimal burden placed on the purchaser.\textsuperscript{88}

\textbf{B. United States Trust and Allied}

In 1977, with its decision in \textit{United States Trust Company}, the Supreme Court revived the contract clause and gave it extended power as it used the contract clause to invalidate state legislation.\textsuperscript{89} This case concerned the repeal by the New York and New Jersey legislatures of legislative covenants that served as security to the holders of bonds issued by the Port Authority of New York and New Jersey.

The Port Authority was organized in 1921 to coordinate transportation around and through the Port of New York. In 1960, the Port Authority proposed to acquire the Hudson and Manhattan Railroad, a bankrupt commuter system that served an area around the Port. As part of the legislative authorization to acquire the railroad,

\textsuperscript{86} \textit{El Paso}, 379 U.S. 84 at 511.
\textsuperscript{88} Id. at 516-17.
\textsuperscript{89} \textit{United States Trust} 431 U.S. at 33.
both the New York and New Jersey legislatures repealed their covenants pursuant to an expansion plan that necessitated the use of Port Authority income in ways that would conflict with the covenants. This repeal was attacked as an impairment of the contract between the states and the bond holders.90

The first question the Court addressed was whether the repeal actually impaired a contract obligation.91 It was admitted that the covenant was part of the contract, but the parties disagreed as to whether the repeal had a significant effect on the market for the bonds. However, the Court was not concerned with the value of the impairment. Rather, it found that the covenant, as a security provision, was an important part of that contract.92 Having found an impairment, the Court turned to Blaisdell for the proposition that the contract clause's prohibition is not absolute and must be reconciled with the exercise of the state's police powers.93 "Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question of whether that impairment is permitted under the Constitution."94 The New Jersey Supreme Court found that the repeal was a legitimate exercise of police power because New Jersey had a strong public interest in furthering mass transportation, energy conservation, and environmental protection. The United States Supreme Court noted that a legitimate public purpose for legislation is not of itself sufficient to survive a contract clause challenge. "Yet the Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation."95

In striking the balance between the contract clause and the state powers, the Court looked to the reasonableness test in Blaisdell and the policy of legislative deference articulated in East New York Savings Bank v. Hahn.96 "As is customary in reviewing economic and social regulation, however, courts properly deferred to legislative judgment as to the necessity and reasonableness of a

90. Both states repealed their covenants; however, suit was brought against New Jersey alone.
91. United States Trust, 431 U.S. at 17.
92. Id. at 19.
93. Id. at 21.
94. Id.
95. Id.
particular measure." This is not the proper test, however, when a state impairs its own contract. When the state impairs its own financial obligations, deference to the legislative determinations of reasonableness and necessity is not appropriate.

The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligation of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. Thus, the Court returned to Blaisdell's strict scrutiny standard for judging some contract-clause violations, although the Court did not use Blaisdell's formal factors.

The Court acknowledged that the state's asserted goal of encouraging mass transportation to effect energy conservation was legitimate. It went on to determine whether the impairment of the contract as part of the means the state used to reach that goal was "both reasonable and necessary." It rejected the state's asserted goals as a justification for legislation that impaired contracts as being neither necessary or reasonable. The Court used a very strict test of "necessity;" it considered the necessity of the repeal of the covenant on two levels. First, the Court considered whether a mere modification of the covenant, that is, a less drastic measure than total repeal would have served the same purpose. Second, the Court considered whether the state might reach that goal of energy conservation by alternative means that would require no alteration of the covenant at all. According to the Court, the choice among alternative means is not always discretionary with the state. "[A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would

97. United States Trust, 431 U.S. at 22, 23.
98. Id. at 25, 26.
99. See id. at 22, 23 n.19. The Court attempted to integrate Blaisdell's factors of emergency and temporariness into the more general consideration of "reasonableness." Although the Court did not articulate them as considerations in this case, they re-emerge in a more concrete form in Allied Structural Steel.
100. United States Trust, 431 U.S. at 29.
serve its purpose equally well.\(^{101}\) The burden of showing that the impairment is necessary falls on the state. "In the instant case the State has failed to demonstrate that repeal of the 1962 covenant was similarly necessary."\(^{102}\)

The decision in *United States Trust* marked a significant change in contract clause adjudication. Although the Court seemed to limit its stringent tests of necessity and its refusal of deference to situations in which a state impairs its own obligations, the case illustrated a shift in the Court's attitude toward the protection of private property rights. The Court extended its *United States Trust* analysis to an impairment of contracts between private individuals in *Allied Structural Steel v. Spannous*,\(^{103}\) which it decided the next year.

The Minnesota Pension Benefits Act\(^{104}\) was challenged by the Allied Structural Steel Company as being violative of the contract clause.\(^{105}\) Allied's main office was in Illinois, and it had a small office in Minnesota. The company maintained a pension plan for its employees to which it alone made contributions and over which it retained the power to unilaterally alter or revoke.\(^{106}\) Allied made its contributions to the plan based on actuarial estimates of its eventual payouts.\(^{107}\)

In 1974, Minnesota enacted the Private Pension Benefits Act.\(^{108}\) Under the Act, a private employer that employed a hundred or more employees—with at least one in Minnesota—and provided pension benefits under a plan that qualified for tax treatment under Section 401 of the Internal Revenue Code, and either terminated the plan or left the state, would be subject to a "pen-

\(^{101}\) Id. at 30, 31.
\(^{102}\) Id. at 31.
\(^{103}\) Allied, 438 U.S. 234.
\(^{105}\) At the district court level, challenges were brought under the due process, equal protection, commerce, and contract clauses in Fleck v. Spannaus, 449 F. Supp. 644 (D. Minn. 1977).
\(^{106}\) Allied, 438 U.S. 236-38. Rights would vest under Allied's plan if an employee, aged 65 or more, retired—regardless of length of service with the company. Benefits payable at age 65 would also accrue if (1) (s)he reached age 60 and worked 15 years for the company; or (2) (s)he was at least 55 years old and the sum of his/her age plus the number of years of service equalled at least 75; or (3) (s)he was under 55 but his/her age plus the number of years of service equalled at least 80.
\(^{107}\) Id.
\(^{108}\) See supra note 104.
sion funding charge." This charge would be the difference between the amount currently in the fund and that necessary to cover full pensions for all employees who had worked at least ten years for the company. Allied closed its Minnesota office in 1974 and was assessed a funding charge of approximately $185,000. Allied challenged the statute in Federal District Court, where it was upheld.

The Supreme Court found no difficulty in determining that the statute substantially altered the contract relationship between the company and its employees by changing the terms of the pension agreement. "The Act substantially altered those relationships by superimposing pension obligations upon the company conspicuously beyond those that it had volunteered to undertake." As in United States Trust, however, the Court found that the existence of an impairment of the contract is not necessarily a violation of the contract clause. That determination is made by striking a balance between the command of the contract clause and the valid and necessary exercise of police power for the general good of the public.

To determine the proper balance, the Court turned to Blaisdell. Unlike the United States Trust Court, however, the Allied Court looked directly at the five factors articulated in Blaisdell. The Court incorporated these factors into its analysis in their original form instead of subsuming them into the concept of "reasonableness" as the United States Trust Court did.

In upholding the state Mortgage Moratorium Law, the court found five factors significant. First, the state legislation had declared in the act itself that an emergency need for the protection existed. [Blaisdell], at 444. Second, the state law was enacted to protect the basic societal interest, not a favored group. Id., at 445. Third, the relief was appropriately tailored to the emergency that it was designed to meet. Id. Fourth, the imposed conditions were reasonable. Id. at 445-447. And, finally, the legislation was limited to the duration of the emergency. Id., at 447.

In applying these factors in conjunction with the nondeferential

110. Allied, 438 U.S. at 240.
111. Id. at 241.
113. See supra note 99.
attitude adopted in *United States Trust*, the Court began with an analysis of the severity of the impairment of the contract. Based on the balancing test the Court had used in *El Paso*, the Court indicated that if the alteration of the contract were minimal, and thus would place little burden on the individual, the analysis might terminate. "Minimal alteration of contractual obligations may end the inquiry at its first state. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." Under the Court's current test, then, when the impairment of a contract between individuals is severe, it will receive the same close scrutiny given to a state's impairment of its own obligations. In addition, the greater the degree of impairment is, the less deference the Court will give to the state legislature.

The Court measured the severity of the impairment primarily by looking at the degree to which the impairment undermined reasonable reliance on the contract. The Court used reliance as the measure since it saw the protection of stability in contract relations and the consequent reliance on those contracts as one of the primary purposes of the contract clause.

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

In this case, the company's reliance on the contract was significant in that it calculated the amount of its contribution to the fund on the basis of its projected actual payouts.

Having established a significant impairment of the contract, the Court examined its necessity and reasonableness. The Minnesota legislation failed this test.

There is no showing in the record before us that this severe disruption of contract expectations was necessary to meet an important

116. *Allied*, 438 U.S. at 245. (Citation to *El Paso* omitted).
117. Id.
118. Id.
119. Id. at 245. This view also reflects an objection to the retroactivity of the legislation. See notes 30, 31, 32 *supra* and accompanying text.
general social problem. The presumption favoring "legislative judgment as to the necessity and reasonableness of a particular measure," United States Trust Company, 431 U.S., at 23, simply cannot stand in this case.\footnote{120}

Thus, the Court will require a showing of strict necessity, apparently as defined in United States Trust; that is, the measure was necessary to meet the goal and no lesser impairment would have sufficed.

Testing the Minnesota legislation under this standard, the Court first found that the legislation was not a response to an emergency or a pressing social problem.\footnote{121} The Court was quick to point out, in a footnote, that "an emergency of great magnitude" is not a prerequisite to a valid law that has the effect of impairing contracts.\footnote{122} The clear implication of the opinion is, however, that the statute must address a "broad societal interest."\footnote{123} The opinion also implies that whatever situation the state legislation addresses, it will be compared by the Court with the "broad and desperate economic conditions" that justified the legislation in Blaisdell.\footnote{124}

The final factor that the Court considered was the degree to which the area had been previously regulated.\footnote{125} The theory behind this consideration is that if one enters into a contract in a field that is highly regulated, one expects that the law might change and therefore reliance on the contract terms is reduced.\footnote{126}

Holding that the Minnesota Private Pension Benefits Act violated the contract clause, the Court summarized the four factors of its analysis by comparing the Pension Act to the Mortgage Moratorium Act that was upheld in Blaisdell.\footnote{127} The Court's reasons for striking the statute were: (1) it was not enacted to deal with a "broad, generalized, economic or social problem," (2) it did not "operate in an area already subject to state regulation," and (3) it "did not effect simply a temporary alteration of the contract relations of

\footnotesize{120. Allied, 438 U.S. at 247.}
\footnotesize{121. Id. at 249.}
\footnotesize{122. Id. at 24.}
\footnotesize{123. Id. at 249.}
\footnotesize{124. Id.}
\footnotesize{125. See Veiux v. Sixth Ward Building & Loan Ass'n, 310 U.S. 32 (1939). In this case, the Court, in holding that there was no violation of the contract clause, noted that the building and loan associations were highly regulated.}
\footnotesize{126. Id. at 37.}
\footnotesize{127. Allied, 438 U.S. at 250.}
those within its coverage, but worked a severe, permanent, and immediate change in those regulations—irrevocably and retroactively." 128

C. Kentucky Revised Statutes 381.930 and 381.940—The Mineral Deed Act

Before applying the new contract clause test to the Kentucky Mineral Deed legislation, let us set forth in question form the analysis that the test requires:

1. Is there an impairment?
2. Is the impairment severe—i.e., is there reliance?
3. Does the legislation serve a broad societal purpose—does it "meet an important general social problem?"
4. Is the impairment necessary?
   a. Is this the only way to reach the goal?
   b. Would a lesser impairment serve as well?
5. Has the area been previously regulated?

The first issue in the analysis, then, is whether a contract right is impaired by the legislation. Kentucky Revised Statute 381.940 makes the surface estate dominant in every case where the severing instrument does not expressly state the method of mining to be used and there is no clear and convincing evidence that the parties intended the mineral estate to dominate. Under this statute, then, even though a mineral lease, deed, or license contains a complete grant of the mineral with all surface use necessary and convenient to the mining operation, the mineral interest holder may be unable to mine by contemporary methods. This is the result regardless of what the parties may actually have intended 50, 60, or 70 years ago. Kentucky's courts have interpreted these instruments for many years. Regardless of what the original parties may have intended, mineral interests have been transferred by contract on the basis of that judicial interpretation of the instruments. The contracts of those who bought or leased the mineral interests from the original purchasers or their successors are certainly impaired. Indeed, the value of their contracts may be total-

128. Id.
ly destroyed if the only way to recover the mineral is by a new method of mining.

This legislation changes the most vital term of contract—what was transferred. This is also the answer to the second question, was there reliance on the contract? People enter into contract relations believing that words mean what they say—that a grant of mineral rights means that you can mine—especially when that belief is supported by hundreds of judicial decisions construing instruments virtually identical to yours. Millions of dollars have been spent in this state to purchase mineral rights in reliance on the contract, believing that it would allow the mineral to be removed. Kentucky Revised Statute 381.940 has defeated that reliance, and in many cases, made the investment worthless.

The third consideration is the purpose of the legislation. The mineral deed legislation has seven stated purposes. Under the Allied analysis, those purposes are subject to a de novo scrutiny to determine whether the legislation actually meets a broad social purpose. The articulated purposes make no declaration of emergency or exigency. The legislation was not enacted, then, to meet some new and pressing circumstance. The beneficial effect of the statute is relatively limited. It will benefit only those who own the surface of land that has been severed into a mineral and surface estate and who do not want the surface mined. A limitation on the methods of mining can by no stretch of the imagination benefit or serve the needs of mineral owners. Indeed, for every surface owner who is benefitted by the legislation, there is a mineral owner who is injured by it. Nor does the statute prevent the deleterious effects of strip mining. It neither forbids nor regulates strip mining. No part of the statute prohibits a surface owner from agreeing to have the surface stripped.

A number of the stated purposes relate to the protection and stability of titles to land. Land titles are beyond question an important interest to the state. In *El Paso*, stabilizing the title to land was a sufficient state interest to support legislation that impaired contracts. The problem with the Texas land titles in *El Paso*, though, was that the unlimited redemption period created a cloud on the title. There was a problem in determining who owned the

129. *See supra* note 2.
land. The Kentucky legislation, however, does not facilitate or in any way improve the state of land titles. Land titles record who owns the land and what land they own. The uncertainty in Kentucky's land titles does not stem from the relation of dominance and servience between the surface and mineral estates, but from the fact that they are severed, in that the severing of the estates greatly increases the number of owners with recordable interests. The relation between the estates, however, is not even part of the title record. Therefore, the Mineral Deed Act has little or no effect on the state land titles, and certainly it does not serve the kind of important state interest in land titles that the legislation in *El Paso* did.

A number of the stated purposes for this legislation relate to a desire to ensure certainty and uniformity in the law. This legislation does exactly the opposite. The meaning of the instruments affected by the statute has been judicially settled at least since the decision in *Buchanan v. Watson* in 1956, and in some cases for much longer.131 For at least thirty years there was certainty in the law, until this legislation was enacted. Instead of being interpreted according to the settled law, every severing instrument is now subject to adjudication as to what mining method it describes and whether there is clear and convincing evidence that the mineral estate was intended to be dominant. Thus it seems that the Mineral Deed Act serves few, if any, of the purposes it states. In addition, it creates more problems than it solves.

The next inquiry is whether the impairment of contracts by the Mineral Deed Act is the only way to reach the goals it sets out. Many of its purposes have been adequately served by judicial decisions that have determined the relationship between surface and mineral estates. The improvement of land titles could be better attained through a dormant mineral statute132 that would facilitate the development of unused minerals or a quiet title statute that would permit the title to land to be absolutely determined as against the world, rather than only against named defendants.133

131. *Buchanan*, 290 S.W.2d at 40. As long ago as 1916, though, the meaning of some common leases and deeds was well settled. See Blue Grass Coal Corp. 168 Ky. 437, 182 S.W. 207 (1916).

132. A dormant mineral statute allows the state to void mineral interests which have not been developed after a substantial number of years. Indiana's Dormant Mineral statute was upheld against a constitutional challenge in *Texaco v. Short*, 102 S.Ct. 781 (1982).

133. KY. REV. STAT. 411.120 (Bobbs-Merrill 1984) — Action to quiet title. This statute only permits the action to be brought against named defendants who assert a claim to the land.
Conservation of natural resources and efficient use of the surface could be effected by stringent and well-enforced reclamation laws. The General Assembly, however, has curtailed this option with its requirement that Kentucky surface mining laws be no more stringent than the federal ones. Thus, the legislature has limited its legitimate option to meet its purpose and has chosen one that impairs the individual land owner's contractual rights. For all the stated goals, an alternative that either does not impair contract rights or impairs them less is available.

Both mining and property rights are highly regulated areas. In the case of property rights, however, the goal is stability, certainty, and uniformity. The existence of regulation of property rights encourages, and is meant to encourage, reliance on them. When one buys real property that is subject to the regulation, one expects not that the law will change, as the Court surmised in *Veiuex*, but rather, that it will remain the same. The final factor—previous regulation—is not applicable then in the area of real property.

Since the new contract-clause test from *Allied* permits the Court to look beyond legislative statements of purpose and reasonableness, a *de novo* analysis of Kentucky's Mineral Deed Act reveals that its stated purposes are not served by the means that it adopts, and those means impair the obligations of contracts. In short, it violates the contract clause, and therefore is unconstitutional.

**III. THE “TAKING” CLAUSES**

Kentucky's mineral deed legislation is also an unconstitutional taking of private property. The United States Constitution imposes two major restraints on the taking of private property for public use. The fifth amendment forbids the taking of private property

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It does not permit the title to be quieted as to all other potential claimants who are not named.

134. KY. REV. STAT. 350.069 (Bobbs-Merrill 1984 Supp.).


136. According to Brooks Talley, Director of Natural Resources Section of the Kentucky Legislative Research Commission, Kentucky's Mineral Deed Act was based largely on a similar Tennessee statute—TENN. CODE ANN. §§ 64-511 (Supp. 1980). The Tennessee statute was held constitutional by the Tennessee Supreme Court in Doochin v. Rackley, 610 S.W.2d 715 (1981). That finding, however, would not support a claim of constitutionality for Kentucky's statute since, unlike the Kentucky statute, the Tennessee statute merely codified Tennessee's common law. Kentucky's statute diametrically opposes Kentucky's common law and thus causes uncertainty and confusion in this area.

137. See supra note 23.
"for public use without just compensation." The fourteenth amendment requires that the owner of private property be afforded due process when the property is taken by the state. The fifth amendment prohibition, which on its face applies only to the federal government, has been made applicable to the states by the fourteenth amendment. The application of these clauses to the actions of government has been the subject of much litigation and "has proved to be a problem of considerable difficulty." In its opinion in Penn Central Transportation Co. v. New York City, the United States Supreme Court admitted its inability to develop a strict rule that will solve the problem.

While this Court has recognized that the "Fifth Amendment's guarantee...[is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" Armstrong v. United States, 364 U.S. 40, 49 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

The Court's "taking" jurisprudence, however, has not been so arbitrary nor so ad hoc as this statement might indicate. The Penn Central majority opinion based its analysis of the asserted taking on a number of "factors" that it distilled from prior taking decisions. An examination of some of these prior decisions reveals that the Court has, over the years, developed a test for determining when an unconstitutional taking has occurred.

The fifth amendment taking clause itself is the starting point of this analysis. That clause only permits the government taking of private property on two conditions: 1) that it be for public use, and 2) that just compensation be paid for the property.

Any exercise that is within the scope of legitimate government

138. Id.
139. Id.
142. 438 U.S. 104.
143. Id. at 123, 124.
144. The fifth amendment provides in part: "nor shall private property be taken for public use, without just compensation." The fourteenth amendment provides: "nor shall any state deprive any person of life, liberty, or property without due process of law."
power is a sufficient "public use" to satisfy the fifth amendment taking clause. "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers." In *Hawaii Housing Authority v. Midkiff*, the Court was asked to determine the parameters of "public use." Hawaii had passed legislation designed to break up its land oligopoly by requiring the land owners to sell residential lots to tenants who met the statutory requirements. The Court found that this was a compensated taking and that it was for a public use. "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." The Court also adopted an attitude of extreme deference toward the state legislature's judgment of what constitutes a public use.

The "private property" that is protected by the taking clause is more than just land. The Court has applied an extremely broad definition to "property" in this context.

The Court has frequently emphasized that the term "property" as used in the Taking Clause includes the entire "group of rights in hearing in the citizen's [ownership]." *United States v. General Motors Corporation*, 323 U.S. 373 (1945). The term is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] . . . denote[s] the group of rights in hearing the citizen's relation to the physical thing, has the right to possess, and use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess." (emphasis added)

At first glance, one would think that the relatively uncomplicated terms of the fifth amendment taking clause would be simple enough to administer. In reality, however, its operation has been restricted and significantly complicated by the reserved powers of the state to act to protect the public health, welfare, and safety. The state, by its police power, does many things that affect its citizens' property interests. This is especially true in light of the expansive definition that is given to property. For example, a zoning ordinance which would prevent a land owner from building a proposed steel

147. Id. at 2331.
mill in a residential area impairs the owner’s right to use that land. Thus, there has been a taking under a literal reading of the fifth amendment. The Court, however, has realized the impossibility of requiring compensation for every taking of the property right. As Justice Holmes put it in *Pennsylvania Coal Co. v. Mahon*,

\[\text{[G]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.}\]

Once some limitation on the effect of the taking clause is recognized, the problem becomes how to define the limitation.

In *Mugler v. State of Kansas* the Court examined the permissible extent of the state’s police power under the fourteenth amendment. Kansas had passed a statute that made the production and sale of any alcoholic beverage illegal except for “medical, scientific, or mechanical purposes.” The plaintiffs had several years prior to the passage of this law built and equipped a brewery in Salina, Kansas. After the passage of this prohibition and the forced closing of their brewery, the plaintiffs sued, complaining that the legislation had deprived them of their property without due process of law. The Court sustained the legislation. It interpreted the state’s police power as being virtually plenary for the purpose of protecting the public health and welfare. As a public health and welfare measure, the Court found it within the state’s power to declare the plaintiffs’ brewery a nuisance and to close it without compensating them for its loss.

A prohibition simply upon the use of property for purpose that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interest. . . . The power which the states have of prohibiting such use by in-

150. *Id.* at 413.
individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by noxious use of their property, to inflict injury upon the community. In finding that the state's police power extended to abating a nuisance, the Court based its decision in part on the theory that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." The court also found that Mugler's loss did not require compensation under the fifth amendment taking clause. It distinguished Mugler's situation from that of the plaintiff in Pumpelly v. Green Bay Co. In Pumpelly, the Court had granted eminent domain compensation to a land owner whose land was flooded by a government dam. The Mugler Court found no relationship between that fifth amendment taking and Kansas' exercise of its police powers under the fourteenth amendment.

These principles [from the fifth amendment] have no application to the case under consideration. The question in Pumpelly v. Green Bay Company arose under the state's power of eminent domain, while the question now before us arises under what are, strictly, the police powers of the state, exerted for the protection of the health, morals, and safety of the people. Under this view, then, actions by the state that further the health, morals, and safety of its citizens are not fifth amendment takings. In the Court's experience, these health, safety, and welfare regulations have fallen into two major categories: land use regulations of nuisances or noxious uses, and zoning. In Penn Central, both the majority and the dissenting opinions recognized these kinds of regulations as exceptions to the fifth amendment taking clause requirement of compensation. There, the regulation in question was New York City's Landmarks Preservation Law. Grand

154. Id. at 665.
156. Mugler, 123 U.S. at 668.
158. Id. at 124, 125, & 133 30 (majority opinion) & at 144-147 (dissenting opinion).
159. See N.Y.C. ADMIN. CODE. ch. 8-A. § 205-1.0 (1976).
Central Station, which was owned by the Penn Central Transportation Company, was designated a "landmark" under that law. Penn Central proposed to build a fifty-story office building over the station. The Landmarks Law required that any external changes or additions to the landmark's structure be approved by the landmarks Preservation Commission. The Commission refused both of the plans submitted by Penn Central. Penn Central then sued, claiming that the Landmarks Law had caused its property to be "taken" without just compensation. Eventually, Penn Central appealed this claim to the United States Supreme Court.

In the majority opinion, the Court began its analysis with a review of some of the "factors" that had been found to be significant in previous taking cases. First among these was "the character of the governmental action." The Court then pointed to two situations in which it has consistently declined to find a taking. The first was land use regulations relating to health and welfare: "[I]n instances in which a state tribunal reasonably concluded that the "health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real property interests." The second exception was zoning laws:

Zoning laws generally do not affect existing uses of real property, but "taking" challenges have also been held to be without merit in a wide variety of situations when the challenged government actions prohibit a beneficial use to which individual parcels had previously been devoted and those caused substantial individualized harm.

The dissenting opinion recognized the same exceptions but labeled them as "the nuisance exception" and "zoning." The difference of opinion between the majority and the dissent was not so much the product of the difference in labels applied to the exceptions as it was the result of disagreement as to whether the statute fell within one of these two exceptions.

160. Penn Central, 438 U.S. at 110.
161. Id. at 119.
162. Id. at 124.
163. Id. at 125.
164. Id.
165. Id.
Determining that the state legislation is a nuisance or zoning regulation is not the end of the analysis. The second step is a consideration of the "economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations..." The state's power to create nuisance and zoning regulations that impair property rights is not unlimited. The "implied limitation" that state police powers place on property rights is itself limited. If at some point the exercise of police power to create nuisance and zoning regulations substantially defeats the property interest, then it becomes a taking. As Justice Holmes said in Mahon, when he first formulated this second part of the analysis:

[A]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due-process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act.

The Mahon limitation on the nuisance and zoning exceptions to the taking clause provides a mechanism for balancing the competing interests of the state in its need to sometimes alter property rights in protecting public health, safety, and welfare and the interest of the land owner in maintaining private property.

The difficulty in applying this test, then, becomes one of determining how much taking by a nuisance or zoning regulation is "too much." Justice Holmes recognized this in Mahon: "[A]s we have already said, this [how much diminution value is too much] is a question of degree—and therefore cannot be disposed of by general propositions." Mahon indicated that a total defeat of the property interest is too much. There, a state law that made it im-

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166. In the interest of clarity and convenience, I have chosen to use the labels for these two categories which Justice Rehnquist used in his dissent in Penn Central. From the descriptions of the two categories and the cases used to illustrate them in the majority and dissenting opinions, I am convinced that they are identical.
167. Penn Central, 438 U.S. at 124.
168. 260 U.S. 393 (1922).
169. Id. at 413.
170. Id. at 416.
171. Id. at 414.
possible for a coal company to mine minerals in which it had a legal property right caused a total destruction of that right and created a taking. In Village of Euclid v. Ambler Realty Co., the Court found a taking when a zoning ordinance caused a 75-percent diminution in the value of a developer's land. In San Diego Gas and Electric Co. v. The City of San Diego, however, the dissent, which had the approval of five members of the Court as to its discussion of the merits of the case, found that a zoning ordinance that deprived the plaintiff of all uses of its land was a taking.

Further inquiry into what degree of deprivation caused by a nuisance or zoning regulation will constitute a taking is not necessary for an analysis of Kentucky's mineral deed legislation. This legislation does not fall into either of these categories: it is neither a zoning ordinance, nor is it designed to protect the public health, safety, or welfare by prohibiting certain contemplated use of land—i.e., abating a nuisance. Even if it were a nuisance or zoning regulation, it creates a total destruction of the property interest and goes "too far."

The Mineral Deed Act cannot be a valid zoning regulation because it does not comply with the prerequisites imposed by the Commonwealth Zoning Enabling Act. The Zoning Enabling Act delineates the minimum research required to support the elements of the zoning plan. Indeed, the mineral deed legislation neither prohibits nor facilitates mining nor any other activity in a particular locality. In addition, it does not prevent surface owners whose land could not be stripped under the current severance from granting the mineral owner permission to strip mine. Therefore, even where it would be effective, it would not control land use.

The legislation is not designed to protect the health, safety, or welfare of the state's citizens. It may have the effect of preventing the strip mining of some lands, thus protecting a limited segment of the populace against the negative effects of strip mining. Again, however, it does not prevent the surface owner from permitting or encouraging such mining. It does not promote the general welfare

172. Id.
175. Id. at 1294 (Rehnquist, J., concurring in the dismissal, agreed with the dissent.)
176. Id. at 1296 (Brennan, J., dissenting).
177. KY. REV. STAT. §§ 100.111-991 (Bobbs-Merrill 1982).
178. KY. REV. STAT. § 100.191 (Bobbs-Merrill 1982).
by facilitating the full use of the state's natural resources—which might indirectly benefit the public welfare. Rather, it makes the development of a significant amount of Kentucky's coal inaccessible and useless.

Thus, Kentucky's mineral deed legislation does not fall within the categories of regulations that are exceptions to the general rule that property rights may not be taken for public use without compensation. Unless compensation is provided for the property rights that the statute impairs, it is unconstitutional.

Even if the mineral deed legislation were construed to be a public health and welfare regulation, it fails the second part of the test; it goes "too far." The holder of a severed mineral estate owns nothing but the minerals. In many cases the mineral is only accessible, literally or economically, by surface mining. When access to those minerals is taken away by a statute that prohibits the use of surface mining, the mineral owner's interest is functionally destroyed. This was the view of Justice Holmes in *Mahon*.179

As said in a Pennsylvania case, "for practical purposes, the right to coal consists in the right to mine it." *Commonwealth v. Clearview Coal Company*, 156 Pa. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.180

It is no answer, then, to say that the mineral owner can still deep mine. In the case where the only feasible way to mine is from the surface, the property interest has been "taken."

Kentucky's Mineral Deed Act is unconstitutional on two bases. It violates the contract clause as it impairs the obligations of contracts and it violates the taking clause of the fifth amendment.

180. *Id.* at 414.
NOTES

USING THE REASONABLE SUSPICION STANDARD TO MAINTAIN A PROPER EDUCATIONAL ENVIRONMENT TO EDUCATE TODAY’S YOUTH — NEW JERSEY v. T.L.O.

It can hardly be argued that either students or teachers shed their constitutional rights ... at the school house gate¹ ... Students in school, as well as out of school are persons under our constitution. They are possessed of fundamental rights which the state must respect ... ²

I. INTRODUCTION

The Constitution of the United States guarantees that all persons will be free from illegal searches and seizures.³ The United States Supreme Court has stated that “protection of constitutional freedoms is now nowhere more vital than in the community of American schools.”⁴ But are students shedding their constitutional rights at the schoolhouse gates? Despite the Court’s pronouncements, students have not received the same degree of fourth amendment protection as adults.⁵ This result has been reached by the utilization of the more liberal “reasonable suspicion” standard suggesting that school searches do not require the historically mandated standard of probable cause. Most jurisdictions attempt to rationalize this dual standard of fourth amendment protection as a necessary sacrifice in the fight against the rising level of violence and drug abuse in the secondary school system.⁶ Although the

1. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969) (Court invalidated a regulation prohibiting students from wearing black arm bands in protest of the Viet Nam War on first amendment grounds; the Court’s holding, however, addressed the broader question of the applicability of the Constitution in schools).
2. Id. at 511.
3. U.S. Const. amend. IV.
5. See generally Comment, Students and the Fourth Amendment: “The Torturable Class,” 16 U.C.D. L. Rev., 709 n.4 (Spring 1983) (lower courts have refused to use the fourth amendment to protect rights of students subject to searches by school officials [hereinafter cited as The Torturable Class]; New Jersey v. T.L.O., 105 S. Ct. 733, 738 n.2, (1985) (holding that the fourth amendment applies with a less exacting standard than probable cause).
United States Supreme Court had given recognition to the struggle by school officials to enforce codes of conduct and to maintain discipline in schools, it had never dealt squarely with the issue of student searches and the fourth amendment. In January 1985, the Supreme Court of the United States in New Jersey v. T.L.O. addressed this specific issue for the first time and held that the strict constitutional standard of probable cause did not apply to student searches by school officials. Moreover, the Court held that school officials need not obtain a warrant before searching a student under their authority. The Court, with the majority opinion delivered by Justice White, declared that something less than the traditional fourth amendment protections are to be extended to students, holding that "when there are reasonable grounds for suspecting that a search will turn up evidence that a student has violated or is violating either the law or a rule of the school," a search of a student's person or belongings is justified.

This note will outline the constitutional developments in the area of warrantless searches by governmental officials, specifically focusing on the evolution of the reasonable suspicion standard; examine the standard of judicial review applied in T.L.O. as compared with earlier warrantless search cases; suggest an alternate method of school search adjudication; and discuss the impact of this decision on future litigation in this area.

II. FACTS AND PROCEEDINGS BELOW

On the morning of March 7, 1980, a faculty member at Piscataway High School in Piscataway, New Jersey, observed Terry Lee Owens, a fourteen-year-old freshman, and another girl named


7. "When society requires large groups of students, too young to be considered capable of mature restraint in their use of illegal substances or dangerous instrumentalities, it assumes a duty to protect them from dangers posed by anti-social activities — their own and those of other students — and to provide them with an educational environment in which education is possible. To fulfill that duty, teachers and school officials must have broad supervisory and disciplinary powers." Horton v. Goose Creek Independent School Dist., 690 F.2d 470, 480 (5th Cir. 1982).

8. 105 S. Ct. at 743.
9. Id.
10. Id. at 744.
Johnson smoking cigarettes in the girls' restroom. 11 Although smoking was permitted in designated areas of the school, it was not permitted in the restroom. 12 The students were taken before the vice principal, Mr. Choplick. 13 Johnson admitted smoking and without further investigation she was required to attend a smoking clinic for three days as punishment. 14 Owens not only denied smoking at the time, but denied she was a cigarette smoker at all. 15 Although Mr. Choplick acknowledged that no further evidence was necessary to impose a sanction for violating school smoking rules, 16 he requested that Owens come into his private office where he demanded to see her purse. 17 When Mr. Choplick opened the purse, he observed a pack of Marlboros inside, 18 and when he removed the cigarettes he uncovered a package of "Easy Roll" cigarette rolling papers. 19 Associating the possession of rolling papers with the use of marijuana, Mr. Choplick subjected Owens' purse to a complete search and discovered a small amount of marijuana, a pipe, small plastic bags, money, a list of students who appeared to owe Owens money, and two letters that implicated Owens in marijuana dealing. 20 Mr. Choplick immediately turned the evidence over to police. After subsequent interrogation by juvenile authorities, Owens confessed that she had been selling marijuana at school. 21 She received a three-day suspension from school for the smoking violation and a seven-day suspension for possession of marijuana. In addition, on the basis of the evidence seized by Mr. Choplick and Owens' subsequent confession, the state brought delinquency charges against Owens in the juvenile and domestic relations court. 22

Contending that the search of her purse violated the fourth amendment and that she had not waived her right to silence when she had spoken to police, Owens moved to suppress both the

11. Brief for the Petitioner, supra note 6, at 3.
13. Id.
14. Brief for the Petitioner, supra note 6, at 3.
15. 105 S. Ct. at 737.
17. 105 S. Ct. at 737.
18. Brief for the Petitioner, supra note 6, at 3.
19. Id.
20. 105 S. Ct. at 737.
21. Id.
22. Id. at n.1.
evidence found in her purse and her confession. The juvenile court denied her motion to suppress, and Owens was sentenced to one year of probation. On appeal, the appellate division affirmed. The Supreme Court of New Jersey, finding that the search did violate the fourth amendment, reversed the appellate court and ordered suppression of the evidence found in Owens' purse. Using a "reasonable grounds" standard of suspicion, the New Jersey Supreme Court held that a student search is not permissible unless the school official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order." The State of New Jersey petitioned for certiorari to the Supreme Court of the United States on the single question of whether the exclusionary rule applied to student searches by public school officials. The United States Supreme Court originally granted certiorari to decide whether the exclusionary rule should bar evidence illegally seized in an unlawful search by school officials. In July 1984, the Court ordered reargument on the broader question of what limits are imposed by the fourth amendment on student searches by school officials. After reargument, the Court concluded that the search of Owens' purse did not violate the fourth amendment. Finding no fourth amendment violation, the Court never resolved the original exclusionary rule issue presented by the parties on certiorari.

III. EVOLUTION OF WARRANTLESS SEARCHES BASED ON REASONABLE SUSPICION

A. Background

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall

23. Id.
28. Id. 94 N.J. at 346, 463 A.2d at 941.
29. 105 S. Ct. at 738.
31. 105 S. Ct. at 738.
32. Id. at 739.
not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person or things to be seized.

The language of the fourth amendment creates a problem of construction in determining the relationship between the "reasonableness clause" and the "warrant-probable cause clause." During the past twenty-five years, the Supreme Court, in its effort to determine the reach of the fourth amendment, has not been consistent in its interpretation of this relationship. Earlier emphasis and focus was placed on the "warrant-probable cause clause" construction. A significant expansion of fourth amendment protection came in 1961 when the exclusionary rule was extended to state proceedings. In 1963, searches were held to be presumptively unconstitutional unless made pursuant to a warrant and probable cause. Furthermore, evidence seized by officials in violation of the fourth amendment was inadmissible in criminal proceedings under the exclusionary rule. In the late 1960s, however, prior warrant and probable cause requirements were circumvented through a de-emphasis of the "warrant-probable cause clause" construction in order to justify certain types of criminal searches and seizures. This reversal was due in part to the Supreme Court's dissatisfaction with the effect of the exclusionary rule, its cost to society, and its often bizarre results. Simultaneously, the Court was under pressure to reduce the large number of undetected and unpunished crimes in American society. The Court under Chief Justice Burger began to increase its reliance on the "reasonableness clause" of the fourth amendment, expanding what previously had been the limits of reasonable searches under "probable cause

33. U.S. Const. amend. IV.
36. In general terms, the exceptions to the warrant and probable cause requirement are consent, exigent circumstances, plain view, administrative searches, searches incident to a lawful arrest, and searches in unique settings that demand that typical fourth amendment requirements be relaxed. The last category would include border searches, auto searching, and school searches. See Note, The Civil and Criminal Methodologies of the Fourth Amendment, 93 YALE L.J. 1127, 1128 n.8 (1984).
37. Myth or Reality, supra note 6, at 289-90.
38. See Stone v. Powell, 428 U.S. 465 (1965) (Chief Justice Burger, concurring, indicated the sentiment of the Court by suggesting the exclusionary rule has demonstrated flaws and should be restricted to a limited category of cases).
39. Comment, supra note 6, at 290.
clause" construction. This change in emphasis eventually led to a dual theory approach to the fourth amendment: the traditionalists maintain that the "probable cause clause" is dominant while the expansionists advocate the supremacy of the "reasonableness clause" to allow for the expedition of law enforcement tasks.\footnote{Comment, An Emerging New Standard for Warrantless Searches and Seizures Based on Terry v. Ohio, 35 Mercer L. Rev. 647, 650 (Winter 1984).}

Although the Court continued its vigilance against arbitrary invasions by governmental officials, it did so with an increasing sensitivity to the governmental purpose involved in the search and with an eye on the rising level of crime. A more conservative Court evolved, employing the reasonableness clause to expand the limits of law enforcement constraints developed under traditional probable cause clause analysis.

B. A Lower Standard of Probable Cause in Searches for Purposes Other than the Discovery of Crime Evidence

The Supreme Court first employed reasonableness-clause construction to announce a lower standard of probable cause in \textit{Camara v. Municipal Court}.\footnote{387 U.S. 523 (1967).} \textit{Camara} considered the effect of the fourth amendment on the right of a resident to deny city housing inspectors access to his apartment without a warrant.\footnote{Id. at 526.} The \textit{Camara} Court first stated that a search warrant must be obtained by administrative inspectors.\footnote{Id. at 522-31.} Probable cause to justify an inspection warrant, however, need only be based on reasonableness.\footnote{Id. at 533.} The reasonableness of a search hinged on the proper balance between the governmental need to conduct a search (safety) against the extent to which privacy interests were invaded.\footnote{Id. at 534-35.} In \textit{Camara}, by balancing conflicting interests to determine reasonableness, the Court advanced a lower standard of probable cause for administrative searches than that required for criminal searches.\footnote{Id. at 534.} Probable cause, although somewhat diluted, was still recognized as the standard by which a particular decision to search was to be tested. However, the highest court began a trend of testing the constitutionality of searches against the mandate of
"reasonableness." The Court concluded the lower probable-cause standard is permissible where the search is not personal in nature, is not aimed at discovery of evidence of a crime, and involves only a limited invasion of privacy.48

Although it limited the holding in Camara to non-criminal regulatory searches, the Supreme Court continued to dilute the traditional probable-cause and warrant requirements in Terry v. Ohio.49 The Court was, once again, faced with tension between law enforcement techniques and constitutional constraints on searches and seizures.50 Decided 120 days after Camara, Terry was the first case to sustain a warrantless search and seizure on less than probable cause.51 In Terry, a police officer observed three men "casing" a store for a long period of time, which suggested to an officer of his experience that they were planning a robbery.52 Suspecting that they might also be armed, the officer approached the men and performed a "pat down" of Terry's clothing.53 This "protective" search resulted in the discovery of a gun in one of Terry's pockets.54 The Supreme Court, completely ignoring the question of whether probable cause existed in the case,55 considered only whether the stop-and-frisk encounter constituted an "unreasonable" search and seizure.56 The Court then introduced a two-pronged "reasonable suspicion" standard, holding that "reasonableness" is determined by a dual inquiry into whether the official's action was justified at its inception and whether the scope of the subsequent intrusion was reasonably related to the circumstances which justified the interference in the first place.57 The intrusion would be justified at the inception if "the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate."58 The search would be reasonable in scope if, using the

48. Id. at 537.
49. 392 U.S. 1 (1968).
50. Comment, supra note 41, at 653.
51. 392 U.S. at 30.
52. Id. at 5-7.
53. Id.
54. Id.
55. Id. at 19-20.
56. Id. at 9.
57. Id. at 19-20.
58. Id. at 21-22.
"balancing test" of *Camara*, the governmental interest in the need to search was greater than the privacy interests invaded.\(^{59}\)

Although the purpose of the *Terry* decision was to create a limited and narrowly drawn exception to the warrant and probable-cause requirement to enable police officers to protect themselves against armed and dangerous individuals,\(^{60}\) the Court continued to dilute fourth amendment protections. Subsequent cases suggest that the "reasonableness" doctrine became a major tool in the Court's campaign to subordinate fourth amendment rights to the achievement of governmental objectives.\(^{61}\) In *United States v. Brignoni-Ponce*,\(^{62}\) the Court officially recognized that a *Terry* search and seizure based on reasonable suspicion was applicable to situations that were, in fact, not dangerous to law enforcement officials.\(^{63}\) In *Almeida-Sanchez v. United States*,\(^{64}\) the Court extended the *Terry* reasonable-suspicion standard to non-criminal border searches.\(^{65}\) In *Michigan v. Summers*,\(^{66}\) the Court employed the balancing technique of *Camara* and *Terry* to justify the detention of an occupant while law officers searched his home pursuant to a valid search warrant.

**IV. WARRANTLESS SEARCHES IN SCHOOLS**

Although adults are afforded fourth amendment protection against arbitrary invasions by governmental officials under either the probable-cause standard in virtually all criminal searches or the lower reasonable-suspicion standard in non-criminal searches, most jurisdictions have refused to use the fourth amendment to protect students against arbitrary searches by school officials. Because of a fear that fourth amendment restrictions would interfere with school officials' ability to enforce codes of conduct and to maintain discipline and order, courts have employed a number of theories to deny all fourth amendment protections to students.\(^{67}\)

59. *Id.* at 27.
60. *Id.*
62. 422 U.S. 873 (1975) (search and seizure by the border patrol).
63. Comment, *supra* note 40, at 231.
64. 413 U.S. 266 (1973) (search and seizure by the border patrol).
65. *Id.* at 277 (neither probable cause nor a warrant were required to uphold the constitutionality of a border search).
67. See *Doe v. Renfrou*, 475 F. Supp. 1012 (N.D. Ind. 1979) (upholding search of high school
Several courts have asserted that searches conducted by school officials are, in effect, searches by private citizens and not subject to constitutional restrictions placed on governmental activity. These courts declare that officials are acting in loco parentis and not as agents of the state. The philosophy underlying this theory suggests that school authorities have an obligation to maintain order and discipline and to protect the welfare of the student so that schools can operate in an atmosphere conducive to education. The primary purpose of any search is, therefore, to further educational objectives, not to obtain criminal convictions. Accordingly, a school official should not be elevated to the status of a law enforcement officer merely because evidence of criminality is uncovered during the search. However, courts have noted that it is state law that imposes the compulsory school attendance requirement. State officials enforcing this requirement are state employees who rely on state authority for their actions. Courts recently have held with consistency that school officials and boards of education are agents of the government and subject to all constitutional restrictions.

A second theory advanced for denying constitutional rights to students is the proposition that the fourth amendment constrains only actions by law enforcement officials and not school officials, since they do not enforce penal statutes or regulations. Other courts have limited the application of the exclusionary rule to constitutional violations by law enforcement officials. These theories that limit the application of the fourth amendment and exclusionary-rule violations to law enforcement officials are in con-

and students by drug detection dogs), modified, 631 F.2d 91, reh'g denied, 635 F.2d 582 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981); see generally The Torturable Class, supra note 5, at 709; Comment, supra note 6; and Comment, Public School Searches and the Fourth Amendment, 9 U. DAYTON L. REV., 521 (Summer 1984).


70. 269 Cal. App. 2d at 511.


lict with earlier Supreme Court pronouncements on constitutional rights of students. They undermine the basic purpose of the fourth amendment — safeguarding the privacy and security of individuals against arbitrary invasions by all public officials.

The only theory that has been advanced for the purpose of denying students fourth amendment rights that has made a more durable impression in many jurisdictions is the expectation of privacy theory. The Supreme Court has held that the fourth amendment is applicable only where the individual's reasonable expectation of privacy has been violated. This theory suggests that the school administration has a property interest in certain school property equal to that of the student. Use of student lockers is non-exclusive based on the administrator's possession of a master key. Where such dual control over property exists, the theory maintains that there can be only a diminished expectation of privacy.

Additionally, administrators are charged with the duty to maintain discipline and security on school premises. Arguably, the dual-property theory has merit because lockers are part of the school property administrators must protect. Although no court has ruled that students lose all expectations of privacy simply by their forced school attendance, jurisdictions consistently deny fourth amendment protection to searches of property under dual control. Most of the school-search decisions that have found a reasonable expectation of privacy lacking involved school lockers. Other courts have held that sniffing of student lockers and cars by drug-detection dogs does not constitute a search and therefore the fourth amendment was not applicable.

In recent years, the majority of courts have attempted to establish a middle ground between denying all fourth amendment

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76. See supra note 1 and accompanying text.
78. The Torturable Class, supra note 5, at 717-18 (citing Katz v. United States, 389 U.S. 347 (1967)).
80. Id.
81. Id.
82. The Torturable Class, supra note 5, at 718.
84. See, e.g., Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir. 1982).
protection to students and requiring the full safeguards of a warrant and probable cause. These courts have waived the warrant and probable-cause requirement and have instead tested student searches against the reasonable-suspicion standard. This is consistent with the Supreme Court's utilization of the reasonable suspicion standard in searches for purposes other than the discovery of criminal evidence. In *Horton v. Goose Creek Independent School District,* students challenged a school district's use of drug-detection dogs to sniff both lockers and students in search of drugs and alcohol. In upholding the searches, the Fifth Circuit concluded that school officials need only have "reasonable suspicion" for their action.

In 1984, two more student-search cases were decided using some form of the reasonable-suspicion standard. In *Bilbrey v. Brown,* the Ninth Circuit Court of Appeals held that school officials lacked "reasonable cause" to search a student for drugs. In the same month, the Sixth Circuit Court of Appeals in *Tarter v. Raybuck* upheld a search of a student on similar grounds. However, *Tarter v. Raybuck* was particularly significant in that the Sixth Circuit Court of Appeals outlined a two-pronged "reasonable cause" standard of review almost identical to the "reasonable suspicion" standard previously employed by the *Terry Court.* The court required that there be reasonable grounds to believe the search was necessary to maintain school discipline and order or a safe environment conducive to education and that the search itself be reasonable in scope.

While jurisdictions have recently struggled to delineate a reasonable suspicion standard for school searches that adequately weighs the importance of governmental interests against the nature

85. *The Torturable Class,* supra note 5, at 723.
86. Id.
87. 690 F.2d 470 (5th Cir. 1982).
88. Id. at 473-74.
89. Id. at 482.
90. 738 F.2d 1482 (9th Cir. 1984).
91. Id. at 1488.
92. 742 F.2d 977 (6th Cir. 1984) (student search for drugs by school official).
93. Id. at 983.
94. Id. at 982. See also *supra* note 57 and accompanying text.
95. Id.
96. Id.
and level of the intrusion, decisions in this area of fourth amendment law have produced confusing and differing results.  

V. REASONING IN NEW JERSEY V. T.L.O.

A. Fourth Amendment Applies to Searches by School Officials

In its analysis, the T.L.O. Court considered the threshold question of whether the fourth amendment applies to unreasonable searches by school officials. After demonstrating that the fourth amendment, by virtue of the fourteenth amendment, prohibits unreasonable searches and seizures by state officers,106 the Court recognized that the fourth amendment protects rights of students against encroachment by public school officials.109 Despite its fourth amendment applicability, the State of New Jersey argued that the history of the amendment indicates the exclusionary rule was intended to regulate only searches and seizures conducted by law enforcement officers, not school officials.100 Rejecting this argument, the Court noted that the fourth amendment safeguards the privacy and security of individuals against arbitrary invasions by all governmental officials — civil as well as criminal.101

The Court recognized that a minority of jurisdictions have concluded that school officials are exempt from the dictates of the fourth amendment because they are said to act in loco parentis.102 In considering this proposition, the Court demonstrated that the concept of in loco parentis, as a source of school authority, is not consonant with today's compulsory education laws.108 Noting that school authorities are state actors for the purpose of constitutional


100. 105 S. Ct. at 740.

101. Id. (citing Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).

102. 105 S. Ct. at 741. See also supra note 68 and accompanying text.

guarantees, the Court reasoned that school officials would be deemed to be exercising public authority, not parental, when conducting school searches.

B. Limitations on Constitutional Searches by School Officials — The New Standard

Having held that the fourth amendment applies to student searches conducted by school officials, the Supreme Court delineated the standard governing such searches. The Court, at the beginning of its analysis, noted that the general prescription of the fourth amendment is that searches and seizures be reasonable. Directing its focus on the "reasonableness clause" and not the "warrant and probable cause clause," the Court adopted the "balancing test" of *Camara* to determine the standard of reasonableness governing school searches. In *Camara*, the Court balanced the individual's legitimate expectation of privacy and security against the government's need for effective methods of providing for public safety. Recognizing that students have a need to carry to school a variety of legitimate non-contraband items, including wallets, purses, and school supplies, the Court noted that students do have a lower expectation of privacy than adults. However, students do not waive all rights to privacy by stepping onto the school grounds. On the other hand, the Court also recognized that the government has an equally legitimate need to maintain discipline and to preserve order in the classroom, especially in light of the current level of drug abuse and violent crime in schools. Accordingly, the Supreme Court concluded that a certain degree of flexibility in school disciplinary procedures was required to maintain security and to preserve a proper educational environment.

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105. 105 S. Ct. at 741.
106. Id.
107. Id.
108. Id. See also supra note 46 and accompanying text.
109. 105 S. Ct. at 747 (Powell, J. and O'Connor, J., concurring) (students do not have the same expectation of privacy as the general population).
110. Id. at 742.
111. Id.
112. Id. at 743.
Unable to strike an equal balance between the student’s expectation of privacy and the government’s need to maintain an environment in which learning can take place, the Court reasoned that both the warrant requirement and probable cause were unsuited to the school environment.\textsuperscript{113} Student searches did not have to be based on the specific belief that the student was violating the law. The Court concluded that the legality of a student search should depend on the reasonableness of the search under the circumstances.\textsuperscript{114}

Using the two-pronged test of \textit{Terry},\textsuperscript{115} the Supreme Court held that reasonableness of a school search involves a dual inquiry: (1) was the action justified at its inception, and (2) was the search as actually conducted reasonably related in scope to the circumstances that justified the interference in the first place.\textsuperscript{116} The Court then noted that a student search is justified at its inception when there are reasonable grounds for suspecting the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.\textsuperscript{117} A search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not extensively intrusive in light of the age and sex of the student and the nature of the infraction.\textsuperscript{118} In applying this two-pronged test to the facts in \textit{T.L.O.}, the majority ruled that the search of Owens’ purse was not unreasonable for fourth amendment purposes.\textsuperscript{119} It rejected the New Jersey Supreme Court’s reasoning that, since possession of cigarettes was not itself illegal nor in violation of school rules, there was no nexus between the search of the student’s purse and the alleged infraction.\textsuperscript{120} Although the Court observed that possession of cigarettes may not be inconsistent with Owens’ claim that she did not smoke at all, it reasoned that possession of cigarettes was relevant to the inquiry.\textsuperscript{121} The Court ruled that if the school of-

\textsuperscript{113} Id. The Court noted that neither warrant nor probable cause were irreducible requirements, citing Almeida-Sanchez v. United States, 413 U.S. 286, 277 (1973).
\textsuperscript{114} Id. at 743-44.
\textsuperscript{115} Id. at 744. See also supra notes 57-59 and accompanying text.
\textsuperscript{116} Id. at 744.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 745.
\textsuperscript{120} Id. at 745-46.
\textsuperscript{121} Id.
ficial had reasonable suspicion that Owens had possession of cigarettes, the search was justified. The Court also rejected the New Jersey Supreme Court's second contention that, even assuming the search may be justifiable under some circumstances, the vice principal had no reasonable suspicion that the purse would contain cigarettes. The Court held that the requirement of reasonable suspicion is not a requirement of absolute certainty, stating that "sufficient probability, not certainty, is the touchstone of reasonableness under the fourth amendment." Using "sufficient probability" as a guide, the Court concluded that the vice principal did not act unreasonably when he examined Owens' purse to see if it contained cigarettes.

Finally, the Supreme Court rejected Owens' contention the search was impermissible in scope. Owens' had alleged that even if it was reasonable for the vice principal to open her purse to look for cigarettes, it was not reasonable for him to reach in and take them out so as to reveal the remaining contents of her purse. The Court held that the vice principal's natural reaction upon seeing the cigarettes was to pick them up, and maintained that Owens' hair-splitting argument had no place in an inquiry on the issue of reasonableness. In so doing, the Court found that neither the initial search for cigarettes nor the subsequent search for marijuana violated the fourth amendment. Accordingly, the Supreme Court reversed the judgment of the New Jersey Supreme Court to exclude the evidence from Owens' juvenile delinquency proceedings.

C. Dissenting Opinions

The dissent contended that the majority decision was flawed in two respects. First, the search of Owens' purse was not justifiable

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122. Id. at 746.
123. Id.
124. Id. (quoting Hill v. California, 401 U.S. 797, 804 (1971)).
125. 105 S. Ct. at 746.
126. Id. at n. 12. (Owens contended that, had the cigarettes not been physically removed from the purse, the vice principal would not have seen the rolling papers that suggested the presence of marijuana, and the search for marijuana would not have taken place).
127. Id.
128. Id. at 747.
129. Id.
130. Justice White delivered the majority opinion at 736; Justices Powell and O'Connor concurred at 747; Justice Blackmun concurred separately at 748; Justice Brennan dissented,
at the inception. Second, the full-scale search of the purse following the visual inspection for cigarettes was not permissible in scope. Justice Brennan emphatically disagreed with the Court’s departure from the constitutional probable-cause standard in its assessment of the permissibility of a full-scale student search. The Court had recognized the search in this case to be a “severe” invasion of privacy, and not the “limited intrusion” of Camara and Terry. Justice Brennan also noted that the Court failed to cite any cases in which full-scale intrusion had been justified on grounds less than probable cause. Full-scale searches previously had been recognized as reasonable in fourth amendment terms only upon a showing of probable cause. Only searches that were substantially less intrusive than full-scale searches had been found justifiable with a balancing test, even absent a warrant and probable cause. Justice Brennan noted that the use of the balancing test to determine the legality of a full-scale search carved out a broad exception to standards developed over many years of considering fourth amendment problems. Justice Brennan reasoned that, since T.L.O. involved a full-scale search, the Court incorrectly substituted reasonable suspicion for probable cause. Applying the probable cause standard to this case, Justice Brennan would have found that the vice principal’s search was not permissible in scope. Justice Brennan noted that when the vice principal opened Owens’ purse and discovered the pack of cigarettes, his search for evidence of a smoking violation was complete. Since the rolling papers were not visible until after the removal of the cigarettes, vice principal


131. 105 S. Ct. at 750 (Brennan, J., dissenting).
132. Id. at 741-42.
133. Id. at 753. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968) (limited search of outer clothing); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (search at border stop consuming no more than one minute); United States v. Place, 466 U.S. 706 (1971) (brief detention of luggage for canine sniff).
134. 105 S. Ct. at 753.
135. Id. at 751.
136. Id.
137. Id.
138. Id. at 754-55.
139. Id. at 758.
140. Id.
Choplick lacked probable cause to perform a full-scale search by rummaging through Owens' purse for drug paraphernalia.\textsuperscript{141}

Justice Stevens disagreed strongly with the Court's rule as to when a search is justifiable at its inception,\textsuperscript{142} arguing that the rule fails to distinguish violent, unlawful, and seriously disruptive conduct from infractions of minor regulations.\textsuperscript{143} His dissent noted that nowhere in the majority opinion did the Court "contend that school administrators have a compelling need to search students to achieve optimum enforcement of minor school regulations."\textsuperscript{144} A search, which itself entails a severe invasion of legitimate expectations of privacy based on suspicion of an infraction of a minor regulation, violates the fourth amendment guarantee of freedom against unreasonable search and seizure.\textsuperscript{145} The Justice advised that a better standard would be one which "would permit teachers and school administrators to search a student when they have reason to believe that the search will uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order or the educational process."\textsuperscript{146} Justice Stevens recognized that the majority, in announcing its rule to determine if a search was reasonable in scope,\textsuperscript{147} did deal specifically with the "nature of the infraction."\textsuperscript{148} Unlike the majority, however, Justice Stevens argued that the nature of the infraction should have been a matter of first concern to determine whether the search was justifiable at its inception.\textsuperscript{149} The Supreme Court of New Jersey recognized the material difference between a search relating to violent and disruptive activity and a search only for evidence of a smoking-rule violation.\textsuperscript{150} Mere possession of cigarettes did not in fact violate a school rule or policy since the school permitted smoking in designated areas.\textsuperscript{151} Applying the Supreme Court of New Jersey's

\begin{itemize}
  \item \textsuperscript{141} Id.
  \item \textsuperscript{142} Id. at 759 (Stevens, J., dissenting) (the majority had held that a search was justified at its inception when there are reasonable grounds for suspecting that a search will turn up evidence that the student has violated either the law or the rules of the school).
  \item \textsuperscript{143} Id. at 763.
  \item \textsuperscript{144} Id.
  \item \textsuperscript{145} Id.
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} Id. at 743.
  \item \textsuperscript{148} Id. at 765. \textit{See supra} note 118 and accompanying text.
  \item \textsuperscript{149} Id. at 766. \textit{See supra} note 118 and accompanying text.
  \item \textsuperscript{149} 105 S. Ct. at 765.
  \item \textsuperscript{150} Id. at 766.
  \item \textsuperscript{151} Id.
\end{itemize}
standard to the facts of this case, Justice Stevens would have held that the vice principal did not have reasonable grounds to believe Owens was concealing in her purse evidence of criminal activity or evidence of activity that would seriously interfere with school discipline or order. Also noting that other school search cases relied on by the United States Supreme Court involved suspicion of criminal activity, Justice Stevens contended that the search of Owens' purse on suspicion of a minor infraction was not justified at its inception and was thus in violation of the fourth amendment guarantee of freedom against unreasonable search and seizure.

The most glaring difference between the majority and the dissenting opinions was the standard of review for determination of the fourth amendment's mandate of reasonableness. The majority embarked on a new course, employing the reasonable-suspicion standard to determine the reasonableness of full-scale non-law enforcement searches. The dissenters disagreed with the standard adopted by the majority, but could not come to agreement on a preferred alternative. Justice Brennan favored the historically tested doctrine of probable cause. Justice Stevens would have restricted application of the reasonable suspicion standard to searches involving suspicion of criminal activity or activity that would seriously interfere with school discipline and order. The weakness inherent in any split decision and the particular mix of this plurality opinion make it difficult to predict whether the new course chosen by the majority will stand the test of time.

VI. ANALYSIS

The outcome in T.L.O. was somewhat predictable. In cases where the initial purpose of a search is not for discovery of criminal evidence, the Court has recently employed the reasonable-suspicion doctrine as a major tool to subordinate the constitutional rights of defendants to the facilitation of governmental objectives. The

152. Id.
153. Id. at n.30 on 767 (Justice Stevens listed twelve cases relied on by the majority that involved searches for marijuana, drugs, stolen money, methedrine pills and speed).
154. Id.
155. Id. at 750.
156. Id. at 763.
157. See supra note 130.
extension of the reasonable-suspicion standard to school-search cases is in keeping with the Burger Court's antagonism toward the exclusionary rule and its effect of letting criminals free on technicalities. The Court in *T.L.O.* has attempted to make the fourth amendment more responsive to what it perceives to be an increasingly violent and disruptive educational environment that has become more hostile to school administrators. The reasonable-suspicion standard appears to be called into service by the Court to uphold a search or seizure whenever there is a clear lack of probable cause. Since the reasonable suspicion standard requires a lower quantum of proof than its predecessor, probable cause, fourth amendment protections are seriously diluted. Concern over unnecessary erosion of fourth amendment rights in the area of student searches is not without justification. 159

Upon closer analysis of *T.L.O.*, it is apparent that the Burger Court employed a number of techniques to expand its earlier reasonable suspicion holdings to encompass searches by school officials of students suspected of minor violations of school regulations. First, the Court completely ignored the limitations it had imposed earlier on the balancing test delineated in *Camara*. 160 Contrary to *Camara*, the search in *T.L.O.* was personal in nature, involved criminal prosecution, and was severely intrusive in nature. Although the *Terry* Court expanded the *Camara* limitation to permit minimally intrusive searches when an officer's life is in danger, 162 it hardly can be said the school administrators in *T.L.O.* had reason to suspect imminent threat to life or limb to justify such an expansion here.

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159. See, e.g., *Bellnier v. Lund*, 438 F. Supp. 47 (N.D. N.Y. 1977) (two school officials required every student in a fifth grade class to strip to his underwear in search of three dollars that was assumed stolen); *Doe v. Renfoux*, 631 F.2d 91, *reh. den.*, 635 F.2d 582 (9th Cir. 1980) (thirteen-year-old female student was strip searched until completely nude because of drug detection dog's erroneous reaction to her); *M.M. v. Anker*, 477 F. Supp. 837 (E.D. N.Y. 1979), aff'd, 607 F.2d 588 (2d Cir. 1979) (search of a female student's purse for possible stolen items lacked reasonable suspicion); *State v. Mora*, 307 So.2d 317 (La. 1975), vacated sub nom; *Louisiana v. Mora*, 423 U.S. 809 (1975), modified, 330 So. 2d 900 (La. 1976), cert. denied, 429 U.S. 1004 (1976) (search of a student's gym bag on grounds that some of the student's companions were narcotics users was unreasonable).

160. 387 U.S. at 735.

161. *Id.*

162. 392 U.S. at 27.
Second, the Court appeared to employ the balancing test to facilitate a predetermined need to favor governmental interests over individual rights. It did so by reducing the supposed degree of student expectation of privacy to such a low level that any governmental interest (e.g., preventing minor school smoking infractions) would be superior. It can be argued that students have a lower expectation of privacy because of the close supervision they are subject to in schools. This premise is consistent with the *in loco parentis* and the dual control of property theories discussed earlier. However, this reasoning is suspect since students are subject to compulsory school attendance and do not voluntarily subject themselves to this supervision. Such a conclusion also appears to be inconsistent with the Supreme Court's previous holdings in *Tinker* and *Goss*.

Furthermore, the majority and dissents in *T.L.O.* agreed on the fact that a woman's purse typically contains items of a highly personal nature and that a search of it represents a "severe" intrusion. It is inconsistent to conclude that a full-scale search of a woman's purse is a severe intrusion unless a strong expectation of privacy is attached.

The apparent flaw of the balancing test is that it announces no specific rules on a prospective basis to guide the courts' balancing, but rather analyzes specific fact situations on a case-by-case basis. It is not rule-oriented and consistent like the probable cause test. Under the balancing test, public need arguably could be elevated to such a high level that, even without discounting the level of expectation of privacy, almost any invasion could be legitimized, making what would otherwise be an unreasonable search reasonable. In *T.L.O.*, balancing was used to legitimize a full-scale search for cigarettes when smoking was only a minor infraction of a school regulation. As noted earlier, the reasonable suspicion standard requires a lower quantum of evidence than is necessary under the probable cause standard. But employment of the reasonable suspicion standard and its balancing test generally have been limited to non-law enforcement searches. However, the evidence discovered pursuant to this smoking-infraction search was subsequently turned over to the police for criminal prosecution. The fourth amendment

164. See *supra* notes 68-73 and 78-84 and accompanying text.
166. See *supra* notes 1, 2, 104, and accompanying text.
requirements have never been so tempered in other areas involving criminal prosecution, e.g., murder and rape, where it would appear the public need would have been greater than in the smoking regulation area. Nevertheless, the Court in *T.L.O.* tempered the level of fourth amendment requirements in schools on the basis of a public need to simply maintain discipline and order in the educational environment. The effectiveness of the balancing test clearly should be questioned if its application will always allow public need to override constitutional guarantees.

Third, the most obvious deviation from precedent made by the Supreme Court in *T.L.O.* was in its formulation of the standard it used to determine when a school search would be permissible at its inception and in scope. The New Jersey Supreme Court had earlier determined that a search was permissible at its inception if the school official "had reasonable grounds to believe that the student possessed evidence of illegal activity or activity that would seriously interfere with school discipline and order."\(^{167}\) The Court, in formulating a new standard to test the reasonableness of school searches, substituted the New Jersey's Supreme Court's more liberal terminology with "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either a law or the rules of the school."\(^{168}\) While the New Jersey test clearly limits the reach of permissible searches, the Supreme Court's new standard is not equally restrictive. Justification for this expansion rests on the Court's sensitivity to the rising level of violence that pervades secondary schools in the United States today.\(^{169}\) The Supreme Court in *T.L.O.* liberalized that requirement to include not only violations of law and serious disruptions but also *any* violation of the rules of the school. By failing to distinguish between serious disruptions and minor school infractions, the Court makes any search "reasonable" at inception regardless of the degree of severity of the violation. Educators can now subject students to searches for both minor school infractions as well as seriously disruptive activity. This result is in apparent disregard of the fourth amendment's prohibition of arbitrary governmental intrusions.\(^{170}\)

\(^{167}\) State in Interest of *T.L.O.*, 94 N.J. at 347, 463 A.2d at 942 (emphasis added).
\(^{168}\) 105 S. Ct. at 744 (emphasis added).
\(^{169}\) *See supra* note 6 and accompanying text.
\(^{170}\) *See supra* note 3 and accompanying text.
The Terry Court, in developing the reasonable-suspicion standard, held that a search was permissible in scope when the safety interests of the official outweighed the defendant's privacy interests given the minor intrusion involved. 171 The T.L.O. Court modified that definition to make searches permissible in scope when “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and scope of the student and nature of the infraction.” 172 The two limitations imposed by the Terry Court have disintegrated. Searches are no longer limited to minor intrusions. Nor do they exclusively involve the paramount public interests or promoting the safety of officials or preventing severe disorder. In fact, the Court evidently does not consider the full-scale school search in T.L.O. unreasonable even in light of the minor nature of the infraction involved. This suggests the Supreme Court may uphold any school search, with the exception of strip searches, 173 regardless of the extent of the intrusion or the degree of severity of the infraction. The Court clearly recognizes that “violent, unlawful, or seriously disruptive conduct is fundamentally inconsistent with the principle function of teaching institutions, which is to educate young people and prepare them for citizenship.” 174 It is suspicious reasoning, however, to find full-scale, severely intrusive searches are not “unreasonable” when used to enforce no-smoking regulations.

The search in T.L.O. can be divided into three distinct phases: (1) opening the purse to view its contents, (2) removing the cigarettes from the purse, and (3) removing the drug-related items that came into view after removal of the cigarettes. No question was raised concerning the constitutionality of opening the purse to view its contents. With regard to the second phase, the question is whether that aspect of the search can be sustained as necessary to enforce the no-smoking regulations, or whether it exceeded the permissible contours of the scope. In this case, it would appear that sanctions could have been imposed on Owens on either the teacher's statement that Owens had been seen smoking or the discovery of cigarettes in Owens' purse. Both had the tendency to prove that Owens' statement that she was a non-smoker was

171. 392 U.S. at 27.
172. 105 S. Ct. at 744.
173. Id. at 765, n.25 (Stevens, J., dissenting).
174. 105 S. Ct. at 762.
a lie. For these reasons, the New Jersey Supreme Court held that the removal of the cigarettes from the purse did exceed the constitutional dimensions of the search. If the removal of the cigarettes cannot be justified as part of the school official's investigation of the smoking infraction, it is doubtful whether it was reasonable for the official to make a full-scale search for drugs. The vice principal had no reason to believe that a full-scale search would produce additional evidence that would tend to prove a smoking violation had occurred. Nor did the vice principal initially have reasonable suspicion that the remaining contents of the purse (prior to the removal of the cigarettes) violated the law or any other school regulation. Nor did the government contend that the full-scale search was justified by the need to seize evidence in order to prevent its destruction since there was no suspicion of criminality at all. In fact, the only rationale offered by the Court to justify the full-scale search was that it was a "knee-jerk" reaction to grab the cigarettes after seeing them. The Supreme Court may have failed to limit the permissible boundaries of the search in T.L.O. to the scope that was necessary to complete the principal's inquiry as to whether a violation of the school's no-smoking regulation had occurred. Once the search was complete for the purpose for which it was intended, any additional inquiry not justifiable by need would be counter to the fourth amendment's general proscription against unreasonable searches and seizures.

Whether the Framers intended fourth amendment protections to turn on "probable cause" or "reasonableness" is not clear. However, the T.L.O. Court's interpretations and expansion of "reasonableness" construction lacks persuasive force because it allows teacher and school officials to accomplish what law enforcement officials cannot do. No one on either side of this case has ever suggested that law enforcement officials would have been permitted to conduct a full-scale search of Owens' purse upon having witnessed her smoking in the restroom and then use any evidence seized in a criminal prosecution for possession of narcotics. If that result is clearly impermissible, why should the same result be permissible if the search is conducted by a school official instead of an officer of the law? Such inconsistent application of constitutional

175. State in Interest of T.L.O., 94 N.J. at 341, 463 A.2d at 939.
176. 105 S. Ct. at 746, n.12.
177. See supra note 3 and accompanying text.
guarantees can lead to unjust imprisonment of high school students and can leave victims of fourth amendment abuses remediless. The decision in *T.L.O.* should be re-examined to determine whether higher standards closely resembling probable cause ought to be required when school officials are not acting exclusively to enforce school regulations, but have intentions of turning over to police all evidence discovered for subsequent criminal prosecution. Alternatively, the standard used to determine whether a search is justified at its inception could be slightly modified to permit searches only when the official has reason to believe the search will uncover evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order or presents an imminent threat to the safety of students or teachers. Such a standard strikes a more reasonable balance between students' fourth amendment rights and concern for the type of violence and unlawful behavior that severely impedes the educational process. Such a standard would allow the courts to provide educators with a certain degree of flexibility in school disciplinary procedures to maintain security and order.\(^{178}\) It would also allow courts to recognize affirmatively students' legitimate expectations of privacy in personal possessions brought onto the school grounds.\(^{179}\) If the standard is not limited to violations of law, severe disorder, and imminent harm, students will have absolutely no expectation of privacy, placing their fourth amendment rights at the same level as prisoners' rights.\(^{180}\) All prior full-scale school search decisions reviewed by the Supreme Court, which had used the reasonable-suspicion standard involved the discovery of evidence of crimes, not minor regulatory infractions. The Court appears to be over-reaching in *T.L.O.* in an effort to use this no-smoking case to announce a proper standard for all school searches by educators who are confronted with disciplinary problems far more severe than smoking in the restroom.

**VII. Conclusion**

The United States Supreme Court declared in *T.L.O.* that school administrators can search students under their authority. It is clear

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178. For a further discussion of the Supreme Court's policy reasons for providing educators with flexibility, see 105 S. Ct. at 742-43.
179. For a further discussion of the degree of students' expectations, see 105 S. Ct. at 742.
180. For a further discussion of students' rights relative to those of prisoners, see 105 S. Ct. at 742 (White, J., delivering the opinion of the Court).
that warrantless school searches are permissible whenever a school official has reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. However, *T.L.O.* was a plurality decision. As a result, it fails to make a powerful statement in the area of full-scale warrantless school searches based on less than probable cause. Moreover, the split decision offers little guidance as to whether the Court will continue to dilute fourth amendment rights because of overriding social interests. The balancing test utilized also allows the Court to evaluate and analyze on a case-by-case basis, which leads to fact-based decisions not usually susceptible to generalization.

The major unanswered question in *T.L.O.* is how the Court will define "reasonableness" in the future. The signals are confusing. On one hand, the same expansive "reasonableness clause" construction might permit any intrusion short of the strip search to enforce codes of conduct in secondary schools. On the other hand, the fragile mix of the split-decision in *T.L.O.* suggests that the Court may later retreat in full-scale search cases to a standard more closely resembling probable cause where criminal prosecution is inevitable.

For the present, what is clear is that balancing has a tendency to promote subsequent fact-based litigation on the same issues. Also readily apparent from the *T.L.O.* decision is that students are denied some constitutional rights at the schoolhouse gate in favor of overriding social interests.

*William R. Brereton*
Kentucky, along with the rest of the United States, has seen a dramatic increase in the frequency and severity of medical malpractice claims since the early 1970s. This increase, which the medical profession refers to as the “medical malpractice crisis,” continues today as 20 out of every 100 physicians face a lawsuit, compared with 12 out of 100 in 1979. This explosion of claims has been attributed to many factors: growth in the number and complexity of medical treatments; increase in the number of lawyers and passage of no-fault automobile legislation in some states; erosion of physician-patient relationships; and pro-plaintiff trends in the common law in general, such as the demise of traditional defenses like charitable immunity and the locality rule. This last reason, in particular, holds true in Kentucky, where decisions by the state’s highest courts have expanded the responsibility of hospitals in seeing that patients are examined and treated with the requisite standard of care. The most recent of these decisions is Paintsville Hospital Co. v. Rose, where the Supreme Court of Kentucky held that a hospital could be held liable on the principles of ostensible agency or apparent authority for the negligence of a physician who furnished treatment to a patient in an emergency room provided by the hospital and open to the public, notwithstanding the fact that the physician was not actually employed by the hospital.

Today’s hospital, especially the modern-day emergency room, is a relatively recent phenomenon. Hospitals of the past were little more than institutions for housing and feeding sick people. More often than not, these hospitals were run by charitable institutions. Emergency rooms, for the most part, were nonexistent. Today, however, emergency rooms are an integral part of hospital care. In fact, utilization of emergency rooms in the United States has

3. Danzon, supra note 1, at 115.
4. 683 S.W.2d 255 (Ky. 1985).
5. Id.
increased dramatically over the past thirty years. The American Hospital Association reports that 78.3 percent of the nation's hospitals operate emergency room departments and more than 160 million outpatient visits now occur there, up from approximately nine million in 1954. There are several reasons for the large number of emergency departments and the substantial growth in the number of patient visits: the number of general practitioners who are willing to make house calls has declined significantly; the emergency room is open twenty-four hours each day and is better able to handle most medical situations with better equipment and facilities than private offices; and many people consider the emergency department to be their community medical center. Also, some hospitals find it financially rewarding to provide such care because they can qualify for tax-exempt status, and some hospitals have established emergency rooms to comply with their state penal statutes. The general rule is that a hospital has no legal duty to maintain an emergency room. If it does, however, it must admit patients to its facilities if the need is present. The courts have defined "emergency" very broadly. Admission to the emergency room is not, of course, all that is required. After admission, prompt, appropriate care is also required.

7. Id. (quoting Cross, Transfer of the Emergency Patient: Avoiding Legal Complication, 35 TEX. HOSP. 11 (1979)).
9. Id. at 22.
12. Galatz, Hospital Liability: The Institution, the Physician, the Staff, 20 TRIAL 64 (May 1984).
13. Id. at 66.
14. See Stauturf v. Sipes, 447 S.W.2d 558 (Mo. 1969). While on a trip, plaintiff became quite ill and spent the night in his car in zero-degree weather. His treating physician determined he had frozen feet and tried to admit him to the only hospital in the community, but the patient was denied admission because he could not produce the required deposit. The patient could not receive hospital care for about three weeks. Finally, a hospital located a distance away admitted him, and found his feet required amputation. The delay in admission, the court found, had materially worsened the plaintiff's condition. The court conceded that a private hospital has the right to refuse admissions, but when it is the only hospital in the area and maintains an emergency room, it is obligated to accept emergency cases. See generally Annot., 35 A.L.R.3d 841.
As hospital care, treatment, and procedures have undergone great changes over the past several years, defining the boundaries of a hospital's liability with regard to the care of patients has become increasingly difficult. Many of the rules laid down in earlier decisions reflect hospital practices of another age. The following is a synopsis of how the liability of Kentucky hospitals in general, and emergency rooms in particular, has evolved to its current state.

I. CHARITABLE IMMUNITY

Historically, charitable institutions were immune from tort liability under the doctrine of charitable immunity. In Kentucky, this immunity was based upon the belief that "funds of such an institution are donated to it, or devised to it, in trust that they will be expended for the charitable purpose of ministering to the poor and needy sick..." and not for defending against lawsuits. At the time of this decision (1921), the country was expanding rapidly in both industry and technology. Eight years later, however, the stock market crashed and the pool of poor and destitute people using these charitable hospitals increased accordingly, thus encouraging courts to maintain the doctrine.

The doctrine of charitable immunity remained intact throughout most of the country until the early 1960s when jurisdictions began discarding it as the nation's economy continued to improve. As corporations and enterprises were growing and expanding, charitable contributions became lucrative tax write-offs and many charities were fast becoming multi-million dollar organizations that were run like businesses with full-time, paid staffs and nationwide backing. In addition, the advent of liability insurance served to protect hospitals from financial disaster. In Kentucky, the doctrine was overruled in Mulliken v. Jewish Hospital Ass'n of Louisville. The Kentucky Supreme Court, in an opinion by Chief Justice Bird, said, "We are impelled by right and reason to reverse

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17. Id.
18. Emery v. Jewish Hospital Ass'n, 193 Ky. 400, 236 S.W. 577 (1921).
19. 236 S.W. 577 at 580 (1921).
22. 348 S.W.2d 930 (Ky. 1961).
our previous holdings and hold that the charitable nature of an institution is not sufficient within itself to give immunity from liability for its tort."23 Charitable hospitals, as private hospitals always had been, were now liable for their torts and for the torts of hospital employees under the doctrine of respondeat superior.24

As hospital immunity was abrogated throughout the country, it became important to determine whether or not an employer-employee or an employee-independent contractor relationship existed, since the hospital could be liable in damages for the torts of its employees.25 This distinction of agency law remained a common way in which Kentucky hospitals avoided liability until the decision in Paintsville Hospital Co. and the forerunning case of Williams v. St. Claire Medical Center,26 where the court of appeals applied the ostensible agency principle to the hospital/nurse-anesthetist relationship.

II. DUTY OF HOSPITAL TO FOLLOW ITS RULES AND REGULATIONS

The theory that a hospital may have breached its duty to a patient when it does not enforce its own rules was first set forth in Kentucky by the state supreme court in 1981.27 The court, in an opinion written by Justice Stephens, implied that a hospital, by not following its rules and procedures, creates an element of a hospital’s negligence, which is an issue for the jury.28 "Whether the hospital hired knowledgeable nurses, or had proper supervision for staff physicians, or accurate record keeping, and so forth, were all evidently questions for the jury to consider,"29 Stephens wrote.

This theory was significantly reinforced in Williams v. St. Claire Medical Center, where a nurse-anesthetist violated hospital regulations that stated how anesthetics were to be administered.30 Judge Miller, writing for the majority, stated, "[W]hile the patient must

23. Id. at 935.
24. Id.
28. Id. at 134.
29. Id. at 136.
30. 657 S.W.2d 590 (Ky. 1983).
accept all the rules and regulations of the hospital, he should be able to expect that the hospital will follow its rules established for his care.\textsuperscript{31}

The proposition that a hospital may owe a duty to its patients to follow its rules and policies is a relative newcomer in the field of hospital litigation, yet has been given increased judicial attention in recent years.\textsuperscript{32} In addition, some courts have held that failure to follow standards set forth by the Joint Commission on the Accreditation of Hospitals\textsuperscript{33} and/or the guidelines formulated by the commission on emergency services of the American Medical Association\textsuperscript{34} also may be a violation of the hospital's duty of reasonable care.

On the other hand, a few courts, such as the Michigan Court of Appeals, have reached a more restricted view on rules and regulations. In \textit{Wilson v. W.A. Foote Memorial Hospital},\textsuperscript{35} Judge Cynar, writing for the court, held that "internal regulations do not establish the applicable standard of care."\textsuperscript{36}

The recent decisions by Kentucky courts in this area, however, reflect some of the more liberal principles set forth in the landmark case of \textit{Darling v. Charleston Memorial Hospital}\textsuperscript{37} in which the Illinois Supreme Court invoked the doctrine of corporate negligence against a hospital. Corporate negligence\textsuperscript{38} differs from the vicarious responsibility imposed under the doctrine of \textit{respondeat superior} in that a nondelegable duty in this instance is owed by the hospital directly to the patient.\textsuperscript{39}

\footnotesize{31. Id. at 594.}
\footnotesize{32. One of the first cases applying this concept was Lucy Webb Hayes National Training School for Deaconesses and Missionaries v. Perotti, 419 F.2d 704 (D.C. Cir. 1969).}
\footnotesize{33. Galatz, supra note 12, at 70.}
\footnotesize{34. Id. at 68.}
\footnotesize{35. 91 Mich. App. 90 (1979).}
\footnotesize{36. Id. at 95.}
\footnotesize{37. 33 I11.2d 326, 211 N.E.2d 253 (1965). The plaintiff, who was 18 years old, broke his leg while playing in a college football game. The physician on emergency call that day applied traction and placed the plaintiff's leg in a plaster cast. Subsequent interference with blood circulation resulted in a partial amputation of the patient's leg. The hospital was found liable for failing to review the attending physician's work or requiring consultation notwithstanding the fact that its agents (nurses) were informed of the condition indicating dangerous impairment of circulation in the broken leg. See generally Annot., 12 A.L.R.4th 57.}
\footnotesize{38. Corporate negligence is the only theory of recovery in jurisdictions that retain the charitable immunity theory. In these jurisdictions, of course, corporate negligence is of crucial importance. See generally Southwick, \textit{Vicarious Liability of Hospitals}, 44 MARQ. L. REV. 153 (1960).}
\footnotesize{39. Cunningham, supra note 21, at 411.}
The Darling court stated three significant interrelated, yet distinct, new concepts in holding the hospital liable.\textsuperscript{40} First, the court held that state health regulations, hospital bylaws and national standards were admissible in evidence to show the standard of care owed by the hospital to patients.\textsuperscript{41} The nonobservance of these standards was not considered conclusive evidence of negligence, but the court also held that the hospital's observance of local custom did not conclusively establish that the hospital had exercised due care.\textsuperscript{42} The Illinois Court of Appeals reinforced this concept fourteen years later,\textsuperscript{43} pointing out that it takes "not medical expertise but administrative expertise to enforce rules and regulations,"\textsuperscript{44} and holding that "the defendants' by-laws are themselves evidence of the standard of care customarily offered by hospitals in the community."\textsuperscript{45} The second concept espoused by the Darling court was that a hospital, at least in some circumstances, has a duty to supervise the specific treatment given a particular patient by a physician practicing within the hospital facility.\textsuperscript{46} The third concept was the implication that a hospital may have a duty to review the general overall competency of its staff physicians and prevent them from treating patients for ailments outside their field of expertise.\textsuperscript{47}

These concepts have been interpreted by one commentator\textsuperscript{48} to amount to a broad duty imposed upon a hospital to supervise the acts of all physicians who use its facilities. But this has not occurred. Only one other case has followed the precedent set in Darling.\textsuperscript{49} Like some courts in other states,\textsuperscript{50} Kentucky's appellate courts have never adopted the theory of corporate negligence for hospital liability, but have applied some of the concepts, although somewhat pared-down in form, found in the Darling decision.\textsuperscript{51}

\textsuperscript{40} Id. at 413.
\textsuperscript{41} 211 N.E.2d 253 at 258 (1965).
\textsuperscript{42} Cunningham, supra note 21, at 413.
\textsuperscript{44} Id. at 718.
\textsuperscript{45} Id.
\textsuperscript{46} Darling, 211 N.E.2d at 258.
\textsuperscript{47} Id. at 261.
\textsuperscript{49} Pederson v. Dumouchel, 72 Wash.2d 73, 431 P.2d 973 (1967).
\textsuperscript{51} See supra notes 26 & 27.
III. HOSPITAL LIABILITY FOR INDEPENDENT CONTRACTORS

As previously noted, the Kentucky Supreme Court's most recent expansion of hospital liability was in *Paintsville Hospital Co. v. Rose*, where the court applied the principle of ostensible agency in making a hospital liable for the negligence of a physician working in an emergency room even though the physician was not actually employed by the hospital.52

Three types of physicians work in the emergency room of hospitals: staff physicians, private doctors, and contract physicians.53 The courts have placed legal responsibility for negligent injury of patients by the hospital's staff physician directly on the hospital, charging that a master-servant relationship under the doctrine of *respondeat superior* exists between the physician and hospital.54 Hospital liability for the negligence of private doctors and contract physicians is not so clear-cut. The private physician is an "independent contractor," who may be an agent of the principal but can never be a servant-agent.55 In addition, some hospitals, including many in Kentucky, have executed contracts with professional corporations to staff their emergency rooms with physicians. The scope of liability of the contract agency, the hospital, and the contract physician, in the event of a malpractice claim, is unclear.56 If the physician is an employee of the hospital, then that institution is responsible under the doctrine of *respondeat superior*.57 If the physician is an independent contractor, the hospital can still be held liable under the "ostensible agency" theory.58 It is through these two main theories—*respondeat superior* and ostensible agency—that hospital liability in Kentucky and throughout much of the country has been based.

A. Respondeat Superior

The doctrine of *respondeat superior* applies only when a master-
servant relationship exists. A principal-master may employ nonagents, servant-agents or nonservant agents, but is liable only for the torts of the servant-agents or, more simply, servants. The courts often state that a principal is liable under the doctrine for the torts of an agent, but they still employ the tests of the master-servant relationship. To determine whether a particular agent is a servant, the courts apply a right of control test. To determine the existence of a master-servant relationship in a hospital setting, the courts use four main criteria: (1) whether the physician is salaried by the hospital; (2) whether he spends all his working hours under the direction of the hospital; (3) whether he devotes all his professional energies to the hospital; and (4) whether he maintains a practice of his own.

Earlier cases reflected the belief that a hospital was only responsible for "administrative" acts of the physicians and not "medical" acts. Many of the decisions in support of the administrative-medical distinction use language indicating that if a particular act is an administrative one, the physician performing it must be regarded as the servant of the hospital, and be within the reach of the respondeat superior doctrine. The courts, however, refused to hold the hospital responsible for medical acts of physicians, as was the case in Schloendorff v. Society of New York Hospital. Judge Cardozo, writing for the majority in Schloendorff, reasoned that it was impossible for the hospital to exercise any right of control over the medical acts of physicians. The hospital merely provided the facilities to be used by the physicians. In addition, Cardozo wrote

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59. The terms master and servant are synonymous with employer and employee in the terminology of the cases and are used interchangeably.
60. Restatement (Second) Agency § 219(1): "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."
61. The word "torts" includes intentional torts as well as negligence. Restatement (Second) Agency § 245.
62. Cunningham, supra note 21, at 387.
63. Id. at 390.
64. Restatement (Second) Agency § 220(1): "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control."
66. Id. at 317-320.
68. 105 N.E. 92, 211 N.Y. 125 (1914), rev'd, Bing v. Thunig, infra note 75.
69. 105 N.E. at 94 (1914).
70. Id.
that physicians and nurses "were to be regarded as independent contractors rather than employees because of the skill they exercised and the lack of control exerted over their work. . . ." This reasoning, called the "professional skill theory," proved enduring. For more than half a century, Schloendorff guided many American courts, including those in Kentucky. In Stacy v. Williams, Kentucky's highest court stated that

[Precedents in several courts of the United States seem to be harmonious in their rulings that where a hospital contracts to furnish, and acts in good faith, with reasonable care in the selection of a physician or surgeon, and selects or authorizes one in good standing in his profession, it has fulfilled its obligation and cannot be held liable for his want of skill."

But this administrative-medical act dichotomy propounded by the New York Court of Appeals in 1914 was soundly rejected by the same court in 1957 in Bing v. Thunig. The court saw no valid reason for specifically excluding medical practitioners if other highly-skilled professionals were not excluded from the application of the doctrine of respondeat superior. The court, commenting on the changing role of hospitals in our society, said:

Present-day hospitals, as their manner of operations plainly demonstrate, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and interns, as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of "hospital facilities" expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility.

In the same manner that courts across the country followed the lead in Scholendorff when it was decided, courts also followed Bing in overruling the 1914 case. In Paintsville Hospital, Justice Leib-

71. Id.
72. Cunningham, supra note 21, at 390.
73. 69 S.W.2d 697 (Ky. 1934).
74. Id. at 707.
75. 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.Supp.2d 3 (1957).
76. 163 N.Y.Supp.2d 3 at 11 (1957).
77. Id.
son, discussing a brief filed by the Kentucky Hospital Association, said it is apparent that the association recognizes that the historical view of hospitals as hotels providing rooms buildings where private medical practitioners treat private patients, represented by Stacy v. Williams . . . is no longer viable. . . . Bing obliterated the former distinction made on agency questions between the physician exercising independent professional judgment and the non-professional hospital employees, and imposed vicarious liability on the hospital for both situations where agency exists.78

Today, under the doctrine of respondeat superior, the hospital is liable to a third person for any injury which proximately results from the tortious conduct of any employee acting within his scope of employment.79

B. Ostensible Agency

Some courts have been willing to extend vicarious liability of hospitals to nonemployees under the theory of ostensible agency or the “holding out” theory.80 The doctrine of ostensible agency applies when the patient proceeds directly to the hospital for treatment or seeks particular treatment primarily from the hospital, but the hospital pays no salary to the physician.81 Although the court finds no “master-servant” relationship actually exists because no salary is paid, the hospital may still be liable for the physician’s negligence under the doctrine of ostensible agency.82

This ostensible agency theory has been described in the Restatement (Second) of Agency as

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.83

Liability is imposed under an estoppel theory rather than under a contract theory.84 The court must decide whether an actual agency

78. Paintsville Hospital, 683 S.W.2d at 258.
81. Cunningham, supra note 21 at 398.
82. Id.
between the employer and the nonemployee appears likely. The test is a subjective one: has the principal (hospital) through its voluntary act placed the nonemployee (contract physician) in such a situation that a person of ordinary prudence, acquainted with the nature of the particular business, is justified in presuming that such nonemployee has the principal's authority to perform the particular act?  

1. Background  

The California case of *Seneris v. Haas*—where the state supreme court held that a hospital can be liable for the conduct of a nonemployee if a patient could reasonably believe that such a person was an employee of the hospital and the hospital had done nothing to dispel that belief—is considered to be the leading case on ostensible agency in a hospital setting. But the decision that set the groundwork for *Seneris* was *Stanhope v. Los Angeles College of Chiropractic* in which the California Court of Appeals stated that "[a]n agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is really not employed by him." The court went on to say that three elements must be present before a plaintiff can recover from a principal for the alleged acts of an ostensible agent: (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; (2) such belief must be generated by some act or neglect of the principal sought to be charged; and (3) the third person in relying on the agent's apparent authority must not be guilty of negligence. Thirteen years later, California's supreme court adopted much of the reasoning set forth in *Stanhope* and further expanded it to include other hospital staff members in addition to physicians.  

Today, as Justice Leibson points out in the majority opinion in *Paintsville Hospital*, the application of ostensible agency to the narrow area of emergency room physicians continues to grow in the

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85. 405 A.2d at 445 (1979).
86. Id. at 446.
88. Id.
89. 54 Cal. App. 2d 141, 128 P.2d 705 (1942).
90. 128 P.2d at 708 (1942).
91. Id.
United States. In fact, he cites a dozen jurisdictions that now apply the principle in emergency room situations, the most recent of which was Kentucky in January 1985.

2. Paintsville Hospital v. Rose

a. The Facts

On March 16, 1979, 16-year-old Grimsey Rose was found unconscious on a sidewalk on Main Street in Paintsville, Kentucky, with his glasses smashed and a swollen, blue spot on his left jaw. Grimsey was admitted to the emergency room of Paintsville Hospital Company, where he was seen by Dr. Kamar J. Ikramuddin, a physician born in India and practicing medicine in the United States since 1975.

Dr. Ikramuddin, who was trained in obstetrics and gynecology but not board certified in that field, was working in the Paintsville Hospital emergency room as a requirement for admittance to the medical staff of the hospital. When Grimsey arrived at the emergency room, Dr. Ikramuddin obtained the patient's medical history, performed a physical examination, and ordered skull x-rays and other lab tests to be performed by employees of the hospital. At that time, Grimsey was not able to respond to questions, but only painful stimuli.

After making an initial diagnosis of a questionable drug overdose and/or head injury, Dr. Ikramuddin reviewed Grimsey's skull x-rays, which she found to be normal. Later that evening, Grimsey was admitted to the hospital for observation to the service of Dr. E. E. Musgrave, who practiced medicine as a general physician.

93. Paintsville Hospital, 683 S.W.2d at 257.
95. Brief for Appellee at 1, Paintsville Hospital Co. v. Rose, 683 S.W.2d 255 (Ky. 1985).
96. Id.
97. Id.
98. Id. at 2.
99. Id.
but was not board certified. At approximately 11:20 p.m., a nurse on duty at the hospital called Dr. Musgrave and told him that Grimsey had pulled out his IV and was restless. The doctor, who did not come to the hospital, prescribed 2 cc's of Valium for Grimsey.

Between midnight and 1 a.m. of March 17, nurses observed the patient talking irrationally at intervals, pulling out the IV needle again, and vomiting undigested food. Between 5 and 6 a.m., Grimsey was seen by Dr. Musgrave, who ordered a urine sample be sent to the toxicology lab for a drug screen and additional Valium be administered. No other treatment was given.

The patient died at about 10 o'clock that morning. An autopsy revealed that the cause of death was a fracture of the left base of the skull involving the left temporal bone and resulting in a massive epidural hematoma.

Jake Rose, Grimsey's father serving as administrator, instituted a wrongful death action to recover damages from the hospital and both doctors for negligence in diagnosing and treating his son.

Paintsville Hospital Company filed a motion for partial summary judgment on the grounds that there was no agency relationship—either real or ostensible—between the hospital and its staff doctors, Dr. Ikramuddin and Dr. Musgrave. The trial court found for the hospital, but the Court of Appeals of Kentucky reversed, finding that "ostensible agency" existed. The Supreme Court of Kentucky affirmed.

The Paintsville Hospital decision follows a similar one by the Kentucky Court of Appeals in Williams v. St. Claire Medical Center in which the court applied the principle of ostensible agency to a hospital/nurse-anesthetist relationship. The supreme court did not consider Williams because there was no motion for discretionary review.
b. The Issues

The appellant, Paintsville Hospital, urged the supreme court to take a very narrow view of ostensible agency in a hospital setting. While the appellant conceded that the doctrine could be applied to cases involving some independent-contractors in a hospital—such as the nurse-anesthetist as in Williams—it argued that it should not be applicable to doctors, especially those in small-town community hospitals.¹¹¹

If we are truly sensible to the real role of a small town community hospital, which is to furnish a place in which God's most independent creation, a small town physician, can practice his art free and independent of any control, then we are immediately aware that in the usual case there can be no justifiable expectation on the patient's part that the physician is an agent of the hospital.¹¹²

The other argument proffered by the appellant is that two elements are required before ostensible agency can be found: (1) representations by the principal of agency, and (2) justifiable reliance by the third person.¹¹³ Neither element was present in this case, the appellant argued.

Rose could not have been induced to believe from her [sic] presence in the emergency room that Dr. Ikramuddin was an agent of the hospital because he was unconscious when brought to the emergency room by local police. There is no proof that he had ever chosen to be a patient in Paintsville Hospital or was there by other than happenstance. Once his father and stepmother arrived and observed Dr. Ikramuddin's ministrations in the emergency room, they elected to employ her separately for her services. They did not choose Paintsville Hospital and would have acquiesced if Dr. Ikramuddin had wanted to transfer Rose to another hospital.¹¹⁴

The appellee, Jake Rose, rebutted Paintsville Hospital's argument that the court should limit ostensible agency in a hospital, saying it "is unworkable and runs counter to plain common sense."¹¹⁵

All independent-contractor medical personnel on the staff of a hospital should subject the hospital to vicarious liability for their negligent acts or omissions committed on the job if the third person

¹¹¹. Brief for Appellant, supra note 107, at 5, 6.
¹¹². Id. at 7, 8.
¹¹³. Id. at 5.
¹¹⁴. Id. at 11, 12.
¹¹⁵. Brief for Appellee, supra note 95, at 5.
or persons claiming to be injured thereby reasonably believed them to be part of the hospital enterprise. Furthermore, it should not make any difference whether the hospital is located in a large city or a small rural community.\textsuperscript{116}

The appellee urged that the supreme court follow the lead of the Washington State Court of Appeals in \textit{Adamski v. Tacoma},\textsuperscript{117} where the court rejected the hospital's position that liability could not be imposed on the hospital unless it had actually informed the patient he was being treated by its employee.\textsuperscript{118} A jury should decide whether the plaintiff reasonably believed the emergency room doctor to be on the staff of the hospital, the appellee argued.\textsuperscript{119}

The undeniable trend among the jurisdictions is to expand hospital responsibility under the doctrine of respondeat superior for the malpractice of physicians. . . . The new test requires the plaintiff to show (1) that he looked primarily toward the hospital for treatment and (2) that the negligent physician was salaried or had a significant relationship with the hospital. But the "two-pronged" test does not require the plaintiff to make the impossible showing that the hospital had the right of control over the manner and details of the treatment rendered by the negligent physician. This is a significant development because it demonstrates the ability of the common law courts to adapt an old doctrine to an increasingly specialized society.\textsuperscript{120}

The appellee also argued that the actual status of physicians rather than their apparent status should not be the controlling factor in such cases.\textsuperscript{121} If it were, "hospitals will be encouraged to tailor secret agreements with staff physicians that will enable them to escape all responsibility toward the victims of malpractice within their walls."\textsuperscript{122}

c. The Opinion

While recognizing that the supreme court has never addressed the issue of ostensible agency in a hospital setting,\textsuperscript{123} Justice Leib-
son wrote that the principle itself is one of longstanding in Kentucky. In *Middleton v. Frances,* he noted, the principle was applied to establish the liability of a taxicab company to a passenger. In that case, the sole connection between the driver and the taxicab company was the company's name painted on the taxi and the rent paid to the company for the privilege of operating it from the company office even though the company did not employ the driver and received no part of the earnings from his taxicab.

In the majority opinion, however, it appears that Justice Leibson is expanding the scope of the ostensible agency principle, at least when applied to the negligence of an emergency room physician.

The cases applying the principle of ostensible agency to the hospital/emergency room physician situation, without exception, do not require an express representation to the patient that the treating physician is an employee of the hospital, nor do they require direct testimony as to reliance. A general representation to the public is implied from the circumstances. Without exception, evidence sufficient to invoke the doctrine has been inferred from circumstances similar to those shown in the present case, absent evidence that the patient knew or should have known that the treating physician was a hospital employee when the treating was performed (not afterwards).

In addition, Justice Leibson said it is "unreasonable to put a duty on the patient to inquire of each person who treats him whether he is an employee or an independent contractor." Quoting a passage from the New Jersey case of *Arthur v. St. Peters Hospital,* Justice Leibson wrote: "[P]eople who seek medical help through the emergency room facilities of modern-day hospitals are unaware of the status of various professionals working there." In support of his view, Leibson points to similar rulings in other jurisdictions, saying "the realities of the situation calls [sic] upon us

124. *Id.*
125. 257 Ky. 42, 77 S.W.2d 425 (1934).
126. *Id.*
127. 683 S.W.2d at 257.
128. *Id.* at 256.
129. *Id.* at 258.
131. 683 S.W.2d at 258.
to interpret ostensible agency as has been done by the courts of sister states, as evidenced by the following quotes:  

Absent notice to the contrary, therefore, plaintiff had the right to assume that the treatment received was being rendered through hospital employees and that any negligence associated with that treatment, would render the hospital responsible.\textsuperscript{133}

In our view, the critical question is whether the plaintiff, at the time of his admission to the hospital, was looking to the hospital for treatment of his physical ailments or merely viewed the hospital as the situs where his physicians would treat him for his problems.\textsuperscript{134}

But Justice Vance, who filed a dissenting opinion in which Justices Aker and Stephenson joined, found that the majority opinion "drastically revises the law pertaining to ostensible agency in that, without expressly saying so, it abolishes reliance upon the alleged ostensible agency as a necessary prerequisite to the imposition of liability upon the ostensible principal."\textsuperscript{135}

Citing Comment (a) of \textit{Restatement (Second) of Agency}, Section 267, Justice Vance wrote:

The mere fact that acts are done by one whom the injured party believes to be the defendant's servant is not sufficient to cause the apparent master to be liable. \textit{There must be such reliance upon the manifestation as exposes the plaintiff to the negligent conduct.} ... \textsuperscript{136}

Justice Vance said the fact that the deceased was found lying unconscious on the street and was taken to the hospital in that condition indicates that a prima facie case "was established that the deceased did not, in his condition upon admission, rely upon a belief that the emergency room physician was, in fact, an agent of the hospital."\textsuperscript{137}

Some circumstances exist in which the hospital's liability under the theory of ostensible agency is limited, Justice Leibson notes in the majority opinion.\textsuperscript{138} "But the operation of a hospital emer-

\begin{itemize}
  \item\textsuperscript{132} Id.
  \item\textsuperscript{133} Arthur, 405 A.2d at 447.
  \item\textsuperscript{134} Grewe v. Mt. Clemens Hospital, 404 Mich. 240, 273 N.W.2d 429, 433 (1978).
  \item\textsuperscript{135} 683 S.W.2d at 259.
  \item\textsuperscript{136} Id. (emphasis added).
  \item\textsuperscript{137} Id.
  \item\textsuperscript{138} Id. at 258.
\end{itemize}
gency room open to the public, where the public comes expecting medical care to be provided through normal operating procedures within the hospital, falls within the limits for application of the principles of ostensible agency and apparent authority.”

IV. CONCLUSION

It is obvious that as hospitals have grown from charitable institutions that did little more than house and feed sick people to multi-million dollar businesses using sophisticated equipment and specialized physicians, the liability imposed on these hospitals for the negligence of employees and nonemployees has grown concurrently.

Many courts have attempted to incorporate a basic goal in developing a doctrine applicable to the hospital-physician relationship: (1) the responsibility of the hospital under the doctrine of respondeat superior should encompass most instances of malpractice committed within the walls of the hospital, and (2) recovery by the plaintiff should not be predicated upon difficult factual inquiries concerning the status of the tortfeasor.

Kentucky has accomplished much of this goal by applying the principle of ostensible agency in a hospital setting, specifically in those situations involving emergency room treatment. Also, the Kentucky Supreme Court has proceeded even one step further than some states, saying that there need not be an express representation to the patient that the treating physician is an employee of the hospital, or that there be any direct testimony as to reliance.

The obvious question now is how far, and in what kind of situations, will this view of ostensible agency be applied to impose liability on hospitals? Will it apply in only emergency room situations? Will it apply to independent contractors in nonemergency situations? These and other questions were left unanswered when Justice Leibson wrote, “The circumstances under which the hospital is liable are not unlimited.” Only future litigation in this area will determine the answers to these questions.

139. Id.
140. Cunningham, supra note 21, at 417-18.
141. 683 S.W.2d at 256.
142. Id. at 258.
Kentucky, whether intentionally or not, appears to be working toward an "enterprise tort" doctrine. The inquiry under this rule is not whether the physician was a servant, but whether the tort occurred within the scope of the hospital enterprise. The scope of the enterprise, then, can be defined as any service, medical or otherwise, the hospital purports to provide the patient. This new doctrine will obviate the factual inquiry into the status of the tort-feasor in most situations.

If Kentucky were to embrace this doctrine completely, it would further increase hospital liability for the malpractice of physicians—a trend that started with the abrogation of charitable immunity in 1961 and continues today with the application of ostensible agency in emergency room situations.

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143. Cunningham, supra note 21, at 418.
144. Id. Cunningham points out that this new concept has, perhaps, already been suggested in the holding and reasoning of Alden v. Providence Hospital, 382 F.2d 163 (D.C. Cir. 1967), in which the court held the hospital responsible for its resident's faulty diagnosis—even though the attending physician concurred in the diagnosis. The court reasoned that since the hospital was engaged in providing diagnostic services, it was responsible when its resident performed such services negligently. The court made no pretense of inquiring whether the negligent resident was a servant.
145. Cunningham, supra note 21, at 418.
146. Id. at 419.
A BLAST FROM THE PAST – THE DOCTRINE OF MUNICIPAL IMMUNITY AND GAS SERVICE CO. V. CITY OF LONDON

I. INTRODUCTION

"There is probably no tenet in our law that has been more universally berated by courts and legal writers than the governmental immunity doctrine."1 Since its Kentucky inception in 18522 the courts have struggled to make sense out of this doctrine which is laden with public policy considerations. Today it is arguable that the struggle continues.

In March of 1985 the Supreme Court of Kentucky had another chance to examine this “legal anachronism of municipal immunity from liability in tort”3 in Gas Service Co. v. City of London.4 This case arose out of a natural gas explosion on January 16, 1979, in London, Kentucky.5 The gas company alleged negligence on the part of the city in its repair of an adjacent sewer line which ultimately caused the escape of gas and resulting explosion.6

This note will focus on the development of municipal immunity in Kentucky, its policy problems, and the court's decision in Gas Service which reaffirmed a twenty-one-year-old “landmark decision”7 that had generally abrogated the doctrine.8 During the course of this reaffirmation the court overruled much of the law charted on municipal immunity since that 1964 decision.9

II. BACKGROUND

The first local government entities were cities, towns, and villages. They have often been called municipal corporations.10 A

2. See, e.g., Prather v. City of Lexington, 52 Ky. (13 B. Mon.) 559 (1852).
4. 687 S.W.2d 144 (Ky. 1985).
5. Id. at 145.
6. Id. at 146.
7. Id. at 146.
8. Id. See also Haney, supra note 1.
10. RESTATEMENT (SECOND) OF TORTS § 895C comment a (1965).
municipal corporation is "[a] legal institution formed by charter from the sovereign." They are "regarded as having a rather curious dual character":

On the one hand they are subdivisions of the state endowed with governmental powers and charged with governmental functions and responsibilities. On the other hand they are corporate bodies, capable of much the same acts as private corporations, and having the same special and local interests and relations, not shared by the state at large.¹²

This dual character is responsible for the confusion and complexities that have surrounded municipal immunity and its application by the courts.

It is generally agreed that the application of the immunity doctrine grew out of an English case, Russel v. Men of Devon,¹³ which was "[t]he first judicial extension of immunity of the State to local government."¹⁴ The doctrine was then brought to the United States by adopting the rule of the Russel case in Mower v. Leicester.¹⁵ This

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¹¹ BLACK'S LAW DICTIONARY 917 (5th ed. 1979).
¹⁴ A Minnesota court described the case thus:
Russel sued all the male inhabitants of the County of Devon for damages occurring to his wagon by reason of a bridge being out of repair. It was apparently undisputed that the county had a duty to maintain such structures. The court held that the action would not lie because: 1) To permit it would lead to "an infinity of actions," 2) there was no precedent for attempting such a suit, 3) only the legislature should impose liability of this kind, 4) even if defendants are to be considered a corporation or quasi-corporation there is no fund out of which to satisfy the claim, 5) neither law nor reason supports the claim, 6) there is a strong presumption that what has never been done cannot be done, and 7) although there is a legal principle which permits a remedy for every injury resulting from the neglect of another, a more applicable principle is "that it is better that an individual should sustain an injury than that the public should suffer on inconvenience." The court concluded that the suit should not be permitted "because the action must be brought against the public."

¹⁵ RESTATEMENT (SECOND) OF TORTS § 895C comment e (1965).
¹⁶ 9 Mass. 247 (1812). As described in Spanel v. Mounds:
[C]ounsel argued that "Men of Devon" did not apply since the town of Leicester was incorporated and had a treasury out of which to satisfy a judgment. The Massachusetts court nevertheless held that the town had no notice of the defect and that quasi-corporations are not liable for such neglect under common law. On the authority of "Men of Devon" recovery was denied. It was on this shaky foundation that the law of government tort immunity was erected... 264 Minn. 279, 118 N.W.2d 795, 797 (1962).
became the general American rule.\textsuperscript{16} Kentucky joined the majority of states adopting the immunity doctrine in \textit{Prather v. City of Lexington},\textsuperscript{17} holding:

Where a particular act, operating injuriously to an individual is authorized by a municipal corporation,...it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual. But, as a general rule, a corporation is not responsible for the unauthorized and unlawful acts of its officers....To render it liable, it must appear that it expressly authorized the acts...\textsuperscript{18}

In cases following \textit{Prather} the Kentucky courts recognized the dual nature of municipal functions and held that while governmental immunity cloaks the acts of the municipality performed as the agent of the sovereign, i.e., when engaged in governmental functions, there is no such immunity when the acts are performed in a proprietary capacity.\textsuperscript{19} The classification of a particular function as one or the other proved to be so difficult and uncertain, however, and the subject of so much disagreement, that there was little uniformity in the decisions.\textsuperscript{20} That which was deemed governmental in some cases was held to be proprietary in others.\textsuperscript{21}

\textsuperscript{16} The general American rule is:

[\textit{I}n the absence of a statutory provision, there can be no recovery against a municipal corporation for injuries occasioned by its negligence or nonfeasance in the exercise of functions essentially governmental in character. In the exercise of such functions, the municipal corporation is acting for the general public as well as the inhabitants of its territory, and represents in such capacity the sovereignty of the state. No liability attaches to it at common law, either for nonuse or misuse of such power or for the acts or omissions on the part of its officers or agents through whom such functions are performed, or of servants employed by agencies carrying out governmental functions of the corporations.]

\textsuperscript{17} \textit{AM. JUR. Municipal Corporations} § 572 (1941).

\textsuperscript{18} Id. at 560.


\textsuperscript{20} Id.

\textsuperscript{21} \textit{See Keppes v. City of Louisville}, 140 Ky. 423, 131 S.W. 184, (1910) (city held liable for negligent failure to maintain its streets in a reasonably safe condition for public travel); \textit{compare} Lampton and Burks v. Wood, 199 Ky. 250, 250 S.W. 980 (1923) (city not liable for negligent acts which might occur when those same streets are sprinkled with water or oil); \textit{see also} \textit{Prather v. City of Lexington}, 52 Ky. (13 B. Mon.) 559 (1852) (failure to keep city sewers in proper repair cited as a prime example of municipal liability); \textit{compare} City of Louisville v. Pirtle, 297 Ky. 553, 180 S.W.2d 303 (1944) (act of constructing a sewer is governmental in nature—no liability); and \textit{compare} Ganu v. Louisville and Jefferson Coun-
In 1964, in Haney v. City of Lexington, the Kentucky Court of Appeals followed the 1957 lead of the Florida Supreme Court, which was the first to pierce the armor of municipal immunity in Hargrove v. Town of Cocoa Beach. Kentucky was one of many states to then abrogate the archaic doctrine. The Haney court held: "We now recede from prior decisions which held municipal corporations immune from liability for ordinary torts. We wish to make it plain, however, that this opinion does not impose liability on the municipality in the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions." Explaining the scope of abrogation, the court continued:

Perhaps clarity will be afforded by our expression that henceforward, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity. In determining the tort liability of a municipality it is no longer necessary to divide its operation into those which are proprietary and those which are governmental. Our decision does not broaden the government's obligation so as to make it responsible for all harms to others; it is only as to those harms which are torts that governmental bodies are to be liable by reason of this decision.

22. Haney, supra note 1 (action by the administratrix of the estate of a child who died as a result of the alleged negligence of the city in the operation of a swimming pool).
23. Id. at 741.
24. 96 So.2d 130 (Fla. 1957) (held no valid distinction between governmental and proprietary functions).
26. Haney, supra note 1, at 742 (emphasis added). "Legislature," "judicial" or "quasi-legislature," or "quasi-judicial" functions might be defined as those requiring discretion, personal deliberation, decision, or judgment. See also Recent cases, Tort—Municipal Tort Immunity Doctrine, 53 Ky. L.J. 404, 405-406 (1964). Some examples are: actions of courts, municipal councils, or other legislative bodies which enact ordinances; and actions of a local governmental entity in the exercise of those administrative functions that involve the making of basic policy decisions, i.e., discretionary functions. The application of immunity in carrying out these functions "is based on the theory that some governmental functions are of a type that should not be subject to review and second guessing by the courts in a tort action." Restatement (Second) of Torts § 895C comment g (1965).
27. Haney, supra note 1 at 742 (emphasis added) (quoting Holytz v. City of Milwaukee, Metropolitan Sewer Dist., 346 S.W.2d 754 (Ky. 1961) (city not liable for damage resulting from construction of sewers).
Haney separated municipal immunity from sovereign immunity and sought to abolish it, making liability the rule.\textsuperscript{28} The court explained that in the last few years it had “accepted the theory with reluctance and [had] seized upon almost any excuse, however flimsy, to grant relief to any person harmed by the negligence of a municipal corporation.”\textsuperscript{29}

In 1968 the court's philosophy took a dramatic shift in City of Louisville v. Louisville Seed Co.\textsuperscript{30} The court believed that “the imposition of broad standards of tort liability upon [municipalities] might be extremely burdensome and could possibly force their curtailment or even abandonment to the detriment of the general public.”\textsuperscript{31} For this reason the court felt some reasonable compromise must be reached by the identification of intermediate legal criteria between the extremes of immunity and liability.\textsuperscript{32} In this way the interests of the injured and the municipality would be balanced without unduly hindering the government in fulfilling its task.\textsuperscript{33} The court settled on the following basis for imposing liability on a municipality:

Where the act affects all members of the general public alike, it would be unreasonable to apply to it broad principles of tort liability.... But, when the city, by its dealings or activities, seeks out or separates the individual from the general public and deals with him on an individual basis, as any other person might do, it then should be subjected to the same rules of tort liability as are generally applied between individuals.\textsuperscript{34}

In other words, the court would not recognize a duty owed by a municipality to any individual citizen when the municipality had engaged in an ultimate function of government for or on behalf of all citizens alike and had created no special relationship with any particular individual.\textsuperscript{35}

\textsuperscript{17} Wis.2d 26, 39-40, 115 N.W.2d 618, 625 (1962) (the abrogation should apply broadly to torts, whether they be by commission or omission).
\textsuperscript{28} Haney, supra note 1 at 742. The court stated it was not its intention to consider the liability of any governmental unit other than that of a municipal corporation and its agents.
\textsuperscript{29} Id. at 739.
\textsuperscript{30} 433 S.W.2d 638 (Ky. 1968) (action by a property owner for damages based on negligence of the city for failure to install flood gates).
\textsuperscript{31} Id. at 641.
\textsuperscript{32} Id. at 642.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 643.
\textsuperscript{35} Brief for Amicus Curiae Kentucky Municipal League at 3, Gas Service, supra note 3.
Louisville Seed sought to affirm the tort theory of liability by asserting that if there was no duty owed, there was no tort committed. The resulting criterion, liability based on duty, was adhered to as the saving grace of the municipal immunity doctrine. For the next seventeen years the Kentucky courts made an effort to apply the legacy of Louisville Seed. The yield compounded the confusion Haney sought to eliminate. For example, in City of Russellville v. Greer, the court found no liability when the defendant city was accused of causing an accident by negligently maintaining a stop sign. The court explained:

The regulation of traffic is a function of government, initiated and implemented for the protection of the general public.... But a municipality owes no legal duty to individual members of the public to fully perform that function. Therefore, a failure of performance does not constitute a tort committed against an individual who may incidentally suffer injury or damage, in common with others, by reason of such default.

By contrast, the same court imposed liability where the city was alleged to have been negligent in the manner in which a police officer directed traffic in Fryar v. Stovall. In answering the question whether the direction of traffic was a governmental function and hence should carry immunity from liability, the court purported to use the authority of Louisville Seed in holding that the city sought out and separated the individual from the general public and was therefore subject to the same rules of tort liability as the individual.

There seemed to be a fine line drawn by the court between the negligent maintenance of a stop sign and the negligent direction of traffic by a police officer. Hence, the doctrine of municipal immunity was again reduced to legal jargon by Louisville Seed, "with language which [was] at least as difficult to understand and apply as the old, discarded proprietary/governmental dichotomy." In March of 1985 the Supreme Court of Kentucky sought to clear the air in Gas Service Co. v. City of London.
III. GAS SERVICE CO. V. CITY OF LONDON

A. Facts

Gas Service Company owned a gas line on Fourth Street in London, Kentucky. The City of London installed a system of sewer lines in close proximity to the existing gas lines. The city then negligently repaired the sewer line which, by the process of electrolysis, destroyed the patching plate used on the sewer line and also caused a hole in the gas line. Gas escaped which resulted in an explosion on January 16, 1979. The blast destroyed some buildings and damaged others.

Negligence actions were brought against the gas company by a number of persons who sustained damage from the explosion. The gas company then filed a third party complaint against the city and the London Utility Commission, seeking contribution and/or indemnity. The trial court granted summary judgment for the

42. Id. at 145.
43. Id.
44. The passage of an electric current through an electrolyte with subsequent migration of ions to the electrodes. THE RANDOM HOUSE COLLEGE DICTIONARY (unabr. ed. 1973).
45. Gas Service, supra note 3, at 145.
46. Id. As explained by the gas company:

In the city of London, Kentucky, there is an alleyway which runs parallel to and in-between Fourth and Fifth Streets running westward off of Hill Street. Years ago at some unspecified time a gas line was installed beneath the service of this alleyway and at some later date a sewer line was installed parallel to the gas line and slightly superior thereto. At some undeterminable time repairs were made to this sewer line in an unacceptable and negligent manner the result of which was the setting up an electrolysis action which caused a hole to be eaten into the gas line. The hole in the sewer was likewise negligently and ineffectively patched thus allowing gas which escaped from the electrolysis hole in the gas line to leak into the sewer line. The sewer line apparently [had] been thereafter abandoned, but was still connected to certain buildings which faced on Fourth Street and ran back to the alleyway. In one of these buildings there was still a dry trap in the sewer connection. Because of this connection and the dry trap, gas was permitted to escape from the gas line through the electrolysisly created hole and into the sewer line... then through the dry trap and into the building. From this location the gas spread through and under the adjoining buildings, one of which had a soft drink dispensing refrigeration unit which was electronically controlled. When the electric current came on, a spark thereby caused ignition of the gas resulting in damage to the involved buildings as well as to considerable property at various places throughout the area. Brief for the Appellant, Gas Services Companying, Inc., at 3-4, Gas Service Co. v. City of London, 687 S.W.2d 144 (Ky. 1985).

47. Id. at 145.
48. Id.
original plaintiffs. The gas company's liability to the original plaintiffs was not at issue in this case.\footnote{49} The trial court also dismissed the gas company's third party complaint against the city.\footnote{50} They held that under the circumstances alleged the city was municipally immune from suit.\footnote{51} The court of appeals affirmed.\footnote{52} The supreme court granted discretionary review to consider once again the "legal morass that has been generated around the subject of municipal immunity."\footnote{53}

The case was consolidated for the purpose of being heard with Sanitation District No. 1 of Campbell and Kenton Counties, Kentucky v. City of Covington, Kentucky\footnote{54} and Murray v. City of Dayton, Campbell County, Kentucky and Buckeye Union Insurance Company.\footnote{55} Each of these cases involved the issue of municipal immunity.\footnote{56}

The supreme court reversed\footnote{57} the decision of the court of appeals and held that the gas company's third party complaint presented a claim for relief.\footnote{58} The order of the trial court dismissing the third party complaint was set aside with directions for further proceedings.\footnote{59}

\textbf{B. The Court's Opinion and Reasoning}

The court reaffirmed the doctrine of municipal liability as established in Haney,\footnote{60} and held the gas company presented a claim for relief cognizable under that rule.\footnote{61} In so doing the Court hailed the Haney decision as the "landmark case in Kentucky on the present status of municipal immunity, [written] with the intention of being dispositive of [the] issue."\footnote{62} The court expressly overruled all cases after Haney that had relied on the modified doctrine as

\begin{footnotes}
\item[49] Id.
\item[50] Id.
\item[51] Id.
\item[52] Id. at 146.
\item[53] Id.
\item[54] Supreme Court number 84-SC-429-DG.
\item[55] Supreme Court number 84-SC-424-D.
\item[56] Brief for the Appellant at 4, Sanitation District No. 1 of Campbell and Kenton Counties, Kentucky v. City of Covington, Kentucky, Kenton Circuit Court 82-C1-686.
\item[57] Gas Service, supra note 3, at 146.
\item[58] Id. at 150.
\item[59] Id.
\item[60] Id.
\item[61] Id.
\item[62] Id. at 146.
\end{footnotes}
set out in *Louisville Seed* and *Frankfort Variety, Inc. v. City of Frankfort.*

Throughout the *Gas Service* opinion, the *Haney* rule and its rationale were echoed by the court. In fact, the court did not add anything of substance to the rule, but rather used it to eviscerate much of the law on municipal immunity set forth after *Haney.*

Its evisceration began with the court of appeal’s decisions rendered after *Haney,* including the instant case, which had classified negligence in maintenance and repair of sewers as immune from liability. The court characterized the post-*Haney* decisions as victims of a “nebulous new classification designated an ‘inherent part’ or ‘ultimate function’ of municipal government.” The court also extended empathy to the movant in the instant case as he wondered how he could have recovered when municipal immunity was the rule, and liability the exception, but could not recover when liability was the rule and immunity the exception.

The court reinforced *Haney,* while cutting such cases as *Louisville Seed* to the quick. The court felt the decisions following *Louisville Seed,* with their new classifications, compromised the *Haney* rule by raising municipal immunity like “Phoenix from the ashes.” In addition, these classifications, like the old governmental/proprietary dichotomy, in the long run proved arbitrary pigeonholes for conclusions arrived at intuitively. The post-*Haney* decisions had not been rationally explained and could not be.

63. *Id.* at 149. See *Frankfort Variety, Inc. v. City of Frankfort,* 552 S.W.2d 653 (Ky. 1977) (owners brought action against city for damage resulting from alleged negligence of city firemen. Court held city not liable on the basis of *Louisville Seed*).
64. *Gas Service,* supra note 3, at 146-150. *Haney* mentioned thirty times by majority.
65. *Id.*
66. *Gas Service,* supra note 3 at 146. See *Hempel v. Lexington Fayette Urban City Gov’t,* 641 S.W.2d 51 (Ky. Ct. App. 1982), and *Carmichael v. Lexington Fayette,* 608 S.W.2d 66 (Ky. Ct. App. 1980); but see *Prather v. City of Lexington,* 52 Ky. (13 B. Monroe) 559 (1852) (failure of city to keep sewers in proper repair cited as a prime example of municipal liability); *Town of Central Covington v. Beiser,* 122 Ky. 715, 92 S.W. 973 (1906) (cause of action against city for damages suffered by a private citizen for damages suffered due to city’s failure to maintain a drainpipe); *Toebbe v. City of Covington,* 145 Ky. 763, 141 S.W. 421 (1911) (recovery by a private citizen against city for damage caused by the negligence of a city in permitting a sewer drain to stop up); *City of Paris v. Baldwin Bros.,* 169 Ky. 802, 185 S.W. 144 (1916) (recovery for damages caused by flooding as a result of the city’s failure to provide an adequate sewer system).
68. *Id.* at 147. See *Haney,* supra note 1.
69. *Gas Service,* supra note 3 at 147.
70. See, e.g., *Louisville Seed,* supra note 30, and *Frankfort Variety,* supra note 63.
By reaffirming Haney, the court also reaffirmed a basic tort premise: liability follows negligence. It maintained that the doctrine of municipal immunity ran counter to this basic concept.

The concept of liability for negligence expresses a universal duty owed by all to all. The duty to exercise ordinary care commensurate with the circumstances is a standard of conduct that does not turn on and off depending on who is negligent. With municipal corporations as with all other legal entities, the question is not whether such a duty exists, but whether it has been violated and what are the consequences.

The court admitted that cases such as Louisville Seed and Frankfort Variety were based on public policy in the name of financial expediency, but went on to say that “problems with payment ha[d] never been a defense to an otherwise valid claim.”

C. The Haney Exception

The court also adhered to the Haney exception to municipal liability for the exercise of legislative, judicial, quasi-legislative, or quasi-judicial functions. Unfortunately, the court “failed to produce cases where this terminology [was] used in the precise context with which [it was] presently concerned”; however, the court listed two cases which it classified as immune under a “reasonable interpretation” of the Haney exception: Grogan v. Commonwealth and Commonwealth Department of Banking and Securities v. Brown.

Grogan and Brown are cases in which “the ‘government [took] upon itself a regulatory function’ which [was] different from any performed by private persons or in private industry.” The court believed that if liability were imposed for the failure to perform such functions, it would be a new kind of tort liability. “[T]he
government was not charged with having caused the injury, but only with having failed to prevent it by proper exercise of regulatory functions which have elements appearing quasi-judicial and quasi-legislative in nature." 83

Justice Wintersheimer concurred with the result of the majority, but in contrast felt the court should not have preserved the Haney exception. He believed it bordered on the inconsistent to allow lingering exceptions, and that any classifications should have been very narrow, uniform, and made by the legislature. 84

Justice Stephenson dissented and was joined by Chief Justice Stephens, stating that the rule of immunity should have been considered an expression of public policy, and that therefore any change should have been left to the legislature. 85 The dissent found fault with the exception in Haney and the majority's application of the exception to Grogan and Brown. The concurrence and dissent agreed insofar as they believed that maintaining the exception in the instant case will cause the same difficulties and confusion as illustrated by the post-Haney cases. 86 For example, Justice Stephenson believed the governmental functions as described in Grogan and Brown were "obviously executive in nature" 87 as opposed to the majority's description as quasi-judicial or quasi-legislative. Hence, the majority's classification of immunities has already been the source of judicial scrutiny and disagreement.

IV. ANALYSIS

A. The Abrogation and Its Remainder

The reaffirmation of the Haney decision was long overdue. In 1964, when Kentucky had first joined the growing majority by abrogating the doctrine of municipal immunity, the court purported to do away with a theory supporting a rule of law not grounded upon sound logic. 88 Immunity became the exception, rather than the rule. Cases after Haney seriously drifted from this rule. 89 The drift was so severe that the Kentucky courts took a quantum leap

83. Id.
84. Id. at 151 (Wintersheimer, J., concurring).
85. Id. at 152 (Stephenson, J., dissenting).
86. Id.
87. Id.
88. Haney, supra note 1 at 739.
89. See, e.g., Louisville Seed, supra note 30 and Frankfort Variety, supra note 63.
backward by increasing the scope of immunity typified by pre-
Haney decisions.

The proprietary/governmental distinction which caused so much
of the inconsistency within the doctrine was abolished by the Haney
court.90 The distinction was labeled a “contrived device,” a result
of the fact that the courts were repelled by the harshness of the
doctrine.91 In post-Haney cases another distinction was reincarnated
from the ashes of the proprietary/governmental classification. This
classification was born of public policy—a need to balance the right
of the citizen to recover with the need to protect a “society from
what could cumulate into ruinous claims.”92 The result was a mere
substitute for the old proprietary/governmental distinction, and
a relapse into confusion while the courts groped for those fine lines
between liability and immunity.

The reversion to a broader immunity after Haney needed to be
addressed, along with the inconsistencies that had plagued the doc-
trine’s application since that time. The court solidly reaffirmed
Haney,93 and in the process labeled most post-Haney decisions as
“legal jargon.”94 The language of the court might lead one to believe
that municipal liability is now the steadfast rule. However, not
only did the court adopt Haney’s abrogation, it also adopted its
exception for the exercise of legislative, judicial, quasi-legislative,
or quasi-judicial functions.95 This belief is short-lived, then, for the
Haney exception has the potential to prolong the distinction
quagmire and once again to rewidens immunity.

Black’s Law Dictionary defines “legislative” as “making or giv-
ing laws; pertaining to the function of law-making or to the pro-
cess of enactment of laws.”96 “Judicial” is defined as “[h]aving the
character of judgment or formal legal procedure; [i]nvolving the
exercise of judgment or discretion; as distinguished from
ministerial.”97 “Quasi” is a “term used...to indicate that one sub-
ject resembles another, with which it is compared, in certain

90. Haney, supra note 1 at 742.
91. Id.
92. Louisville Seed, supra note 30 at 641.
93. Gas Service, supra note 3 at 150.
94. Id. at 148.
95. Id. at 150.
96. BLACK’S LAW DICTIONARY 810 (5th ed. 1979).
97. Id. at 759.
characteristics, but that there are intrinsic and material differences between them."

An example of an immune legislative function is the act of passing a statute. An immune judicial function entails actions of courts. "The immunity may be extended beyond the formal decision of courts and actions of legislators, to acts of other judicial and legislative officers." Quasi-legislative functions have an effect similar to that of a statute or ordinance. Quasi-judicial functions are those that pertain to formal determinations of fact and law. Both quasi-functions can apply to activities of administrative officers and agencies.

The court did not define the Haney exception, but it did tell us that it did not fit the fact situations in Louisville Seed and Frankfort Variety. However, the exception did fit Brown and Grogan. Brown defined regulatory function as a "self-imposed protective function." Grogan did not use the term "regulatory function," but found a city was not liable when it enacted inspection laws designed for the public safety and then failed to enforce them.

All things considered, then, a municipality may be immune from tort liability when it functions in a law-making capacity, in a judicial capacity, when acting so as to have the effect similar to a statute or ordinance, when acting in a capacity that pertains to formal determinations of fact and law, or when acting in a regulatory capacity, which can be a self-imposed protective function or in an

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98. Id. at 1120.
99. RESTATMENT (SECOND) OF TORTS § 895B comment c (1965). "If the statute should happen to be unconstitutional that can be determined in other ways than a tort action against the State."
100. Id.
101. Id.
102. Id.
103. Id.
104. Id.
105. See Gas Service, supra note 3. See also Haney, supra note 1, and Holytz v. City of Milwaukee, supra note 27 (none of these decisions adequately describes the Haney exception).
106. Louisville Seed, supra note 30.
107. Frankfort Variety, supra note 63.
108. See Brown, supra note 80.
109. See Grogan, supra note 79.
110. Brown, supra note 80 at 499.
111. Grogan, supra note 79 at 5.
inspective capacity. Each of these functions can apply to administrative officers and agencies—certainly a broad area. If the court was not able to produce cases where the Haney exception is explained in the precise context in which it was concerned, how could it expect the legal community to apply the exception uniformly and narrowly?

This exception disintegrates the majority's principle that liability follows negligence. "All governmental organizations, municipal or otherwise, should be responsible and accountable for their conduct." Municipal functions have become so varied and extensive that public safety demands that municipal employees be held to the same standards as other citizens. Private citizens voluntarily...insure themselves against tort liability. Why shouldn't a collection of citizens classified as a municipality do likewise?"

B. Policy Problems

1. Where's the Money?

Justice Stephenson, dissenting in Gas Service, stated that "[t]he majority opinion will undoubtedly lead to bankruptcy of many municipalities...." Lack of a fund out of which to pay the injured has been a concern from the beginning for those who were frightened by the imposition of municipal liability. Although a problem with payment has never been a defense to an otherwise valid claim, it certainly merits some consideration.

The majority said that "there are no good economies in an unjust law," but today most cities in Kentucky and other states struggle in the face of ever-rising costs to maintain essential governmental services. In addition, there are legal and practical limitations on a city's ability to raise revenue through taxation. A city can carry liability insurance, but premium rates depend on loss experience. If a high degree of liability is imposed on public agen-
cies, the cost to taxpayers...will be correspondingly great. If risks become too great, insurance could conceivably be unattainable at any price. The ultimate cost will be curtailment or elimination of services. Understandably, there is a real risk to a city's fiscal posture when exposed to broad tort liability. In many instances an individual could insure himself with greater efficiency than a city.

On the other hand, these fiscal risks create a policy argument that advances liability—that is, "exposure of the government to liability for its torts will have the effect of increasing governmental care and concern for the welfare of those who might be injured by its actions." The court's concern should not only be to compensate the victim, but to admonish the wrongdoer. An incentive to prevent harm occurs once the decisions of the courts become known.

The principle that liability follows negligence was the core of the majority's opinion; a corollary to this view is that it is grossly unfair to exempt the various branches of the government from liability and thereby transfer the entire burden of damage upon the individual rather than onto the community where it belongs.

Gas Service is unique in view of the fact that the entity harmed was not an individual but a public utility. If the city were found to be immune, the gas company would have to absorb the entire cost of the injury. The gas company's loss would most likely be passed on to its customers in the form of rate increases. Whether the city or the gas company pays the damage, the loss potentially falls on the citizens in the form of redirected funds that could have been used to provide public services. Here, it is a pure question of policy: Should liability follow negligence? The citizen is the final greenback victim in either case.

2. Whose Province?

Besides the public policy complexities inherent in questions of immunity, liability, and allocation of loss, there is another policy

120. Id. at 6.
121. Id.
122. Id.
125. Id.
126. Barker v. City of Sante Fe, 47 N.M. 85, 136 P.2d 480, 482 (1943).
consideration: Which branch can best solve the complexities—the courts or the legislature?

The majority in Gas Service stated that municipal immunity was "a judicially created monstrosity which should be judicially destroyed." On the other hand, Justices Wintersheimer, Stephenson, and Stephens were of the opinion that resolution of the conflicting public policy changes were best left to the legislature. The legislature could provide the consistency and uniformity sorely needed in the area of municipal immunity by utilizing its superior factfinding facilities for discovering societal needs and weighing social forces. Some of the overall needs and factors which might be considered include the creation of effective risk-spreading devices (such as municipal or private liability insurance) and the identification of those municipal functions which merit complete immunity.

It is virtually undisputed that the courts have the power to do away with a rule they create. Courts should be "alive to the demands of justice," but the Gas Service decision should be an invitation to the Kentucky General Assembly to resolve the complex policy decisions at hand. This is not only a problem for the judiciary but a problem that affects all branches of government.

3. Retrospective Versus Prospective Application

Without discussion, the court applied its decision retrospectively to all pending cases, including appeals where the issue had been preserved. In Haney the court said that "[i]t is within the inherent power of the Supreme Court of any state to give such a decision either prospective or retrospective application without of-

127. Gas Service, supra note 3 at 147.
128. See id. at 150 (Wintersheimer, J., concurring), and id. at 152 (Stephenson, J., dissenting).
130. Id.
131. See, e.g., Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962).
132. Hargrove v. Town of Cocoa Beach, 96 So.2d 130, 133 (Fla. 1957).
133. Gas Service, supra note 3 at 150; compare Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957) (case applied the rule to the instant case without reference to either prospective or retrospective application); Molitar v. Kaneland Community Unit Dist., 18 Ill.2d 11, 163 N.E.2d 89, 86 A.L.R.2d 469 (1959), cert. denied, 362 U.S. 968 (1960) (rule applied
fending constitutional principles"; however, this right does not solve the difficult problems that arise when a law has been changed.

The major problem with a retrospective application is the resulting unbudgeted expenses of the municipality that can arise with liability. City officials should have the opportunity to examine their municipal operations in view of an increased liability risk in order to minimize potential adverse fiscal consequences. If additional insurance is needed, time should be given for its acquisition. Another problem with retrospective application is that the legislature is not given an opportunity to consider what part, if any, it needs to play in making the transition. Cases such as *Louisville Seed* have been relied on for seventeen years; it seems the court could have suspended the application of its decision in the name of the public policy to which it so loyally adhered.

In *Haney* the rule was also applied retroactively to all actions not barred by the statute of limitations. *Gas Service's* retrospective application is different, however, in that financial difficulties municipalities must endure have increased since the *Haney* decision in 1964. "Budget surpluses are a rarity, and due to tax limitations imposed by the state legislature, our cities simply do not have the short- or long-term flexibility to raise additional revenues to meet unbudgeted expenses." It would have been more equitable to apply the court's holding to the case at bar (therefore rewarding the appellant for bringing the issue to the court's attention) and to suspend the prospective application to allow municipalities reasonable time to gain protection, through efforts of the legislature or fiscal planning.

prospectively except as to the case at bar); *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962) (rule applied to the case at bar and made prospective as to all others); *Spaen v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962) (rule made effective after the next legislative session).

134. *Haney*, supra note 1 at 741 (citing Great Northern Ry. v. Sunburst Oil & Refinery Co., 287 U.S. 358 (1933)).

135. *Haney*, supra note 1 at 741.


137. *Haney*, supra note 1 at 742.


139. Id.
V. CONCLUSION

The Kentucky Supreme Court's decision to reaffirm tort liability for municipalities was basically a sound one. Imposition of liability is more in tune with current concepts of justice, and the losses will be spread among all those benefitted by governmental action. Additionally, many scholars believe liability will lead to greater efficiency in municipal endeavors and to the prevention of future harm.

Although the court's decision was a sound one, that soundness is threatened by the recognition of the Haney exception for legislative, judicial, quasi-legislature, and quasi-judicial activities. The exception is ambiguous and broad, leaving the courts open to piecemeal litigation. Any classification should have been uniform and very narrow.

The legislature with its superior factfinding capabilities would be best suited to carve out and define any exception. Many states have enacted statutes imposing liability on municipalities in the form of comprehensive governmental tort claims acts. At the very least the legislature should recognize the public policy considerations inherent in this doctrine by imposing ceilings on the amount of damages a municipality must pay its injured.

In the future, the court will stand on basic tort principles. How the court will finesse the exception remains to be seen. "On the bright side, [the exception] will call for a great many more opinions from [the court] explaining just what is meant by the majority opinion."

DEBORAH BATTLE HOULISTON

142. Gas Service, supra note 3 at 150 (Wintersheimer, J., concurring).
144. See, e.g., Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618, 625 (1962).
145. Gas Service, supra note 3 at 152 (Stephenson, J., dissenting).
*I would like to thank Harry Rankin, Esq., for his support and guidance.
LEMON RECONSTITUTED: AGUILAR V. FELTON
AND PUBLIC AID TO PAROCHIAL SCHOOLS

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . 1

Few portions of the Constitution have engendered as much controversy and criticism for the Supreme Court as these few deceptively simple words — the religion clauses. 2 This has been particularly true in the sensitive area of state aid to parochial schools. In Aguilar v. Felton, 3 the Court was called upon to determine the constitutionality of yet another publicly-funded assistance program affecting parochial schools. Before the Court was New York City's Title I program, developed to aid low-income, educationally-deprived children, and designed to implement Title I of the Elementary and Secondary Education Act of 1965. 4 In a 5-4 decision, with four separate dissents, the Court invalidated the plan, holding that its system of supervision would inevitably lead to an unconstitutional administrative entanglement between church and state. 5 Affirming the decision of the Second Circuit, 6 the Court implicitly left open the possibility that such instruction could be provided constitutionally at neutral sites off parochial school premises. 7

Aguilar was decided in conjunction with a companion case 8 in which the Court struck down two Michigan school system programs. Although the Court maintained that the Michigan and New York plans were factually similar, it went on to decide the cases on different grounds. Moreover, the Court did not point out that there

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1. U.S. CONST. amend. I.
2. The former is known as the establishment clause, the latter as the free exercise clause. Both have been held to apply to the states through incorporation of the due-process clause of the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause); Everson v. Board of Education, 330 U.S. 1 (1947) (establishment clause). For a discussion of incorporation, see Abington School Dis't v. Schempp, 374 U.S. 203, 253-258 (1963) (Brennan, J., concurring).
4. See infra notes 49-57 and accompanying text.
5. Aguilar, 105 S. Ct. at 3237.
6. Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48 (2d Cir. 1984).
7. In Wolman v. Walter, 433 U.S. 229, 248 (1977), the Court upheld a portion of an Ohio statute that provided remedial and therapeutic services to nonpublic school students at neutral sites off parochial school premises.
were at least two significant factual differences between the plans. Unlike New York's Title I plan, Michigan's Community Education Classes were offered in nonpublic schools after regular school hours. In addition, these classes were staffed by otherwise full-time non-public school teachers. This latter consideration weighed heavily in the Court's decision to invalidate the plan. In these and a number of other recent establishment-clause cases, a bare majority of the Court has reaffirmed its adherence to the tripartite Lemon test; however, this is by no means a fait accompli, for the Court has at the same time demonstrated its continued inability to achieve a consensus. It continues to remain sharply divided over both the underlying principles to be served by the first amendment, and the continued validity of the Lemon test.

I. BACKGROUND

In 1947 the Court decided a case that would spark a controversy that remains alive in the Court today. In Everson v. Board of Education, Justice Black invoked Jefferson's now-famous metaphor, concluding that the establishment clause was intended to erect a "wall of separation" between church and state:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious


10. See generally Lemon v. Kurtzman, 403 U.S. 602 (1971) from which the test originated. See also infra notes 31-33 and accompanying text.


12. See infra note 120 and accompanying text.

beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." 14

While Justice Black construed the establishment clause to mean that government had no business participating in the affairs of, or aiding religious institutions in any fashion, he nonetheless upheld New Jersey's plan to reimburse parents of parochial and public school students for the costs of their bus fares to and from school. While he conceded that this would provide some indirect aid to the religious schools, he reasoned that bus fares, like other general government services, 15 were so separate from the religious function of the schools that a contrary holding would result in a non-neutral stance toward religion. 16 This apparent dichotomy led a perplexed Justice Jackson to declare in his dissent that he was reminded of Bryon's Julia, who, while "whispering 'I will ne'er consent,,' — consented." 17

Everson's bus fare program embodies all of the critical elements that have been found necessary at one time or another to withstand establishment clause challenges. These are: (1) general health and welfare legislation; 18 (2) neutrally available to a broad class of beneficiaries; 19 (3) benefitting students and/or parents, not the

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14. Id. at 15-16.
15. Id. at 17-18, listing such general governmental services as police and fire protection, connections for sewage disposal, public highways and sidewalks.
17. Id. at 19 (Jackson, J., dissenting).
schools directly;\textsuperscript{20} (4) indirect, incidental aid to the schools;\textsuperscript{21} and (5) secular function served separable from the sectarian function.\textsuperscript{22}

Over twenty years after \textit{Everson}, the Court upheld a textbook loan program to parochial and public school students\textsuperscript{23} and thus reached the closest it would be willing to get to subsidizing the educational function of sectarian elementary and secondary schools.\textsuperscript{24} Although the loan of textbooks was not general welfare legislation like the bus fares in \textit{Everson}, it was a general program neutrally available to all students, nonpublic and public alike.\textsuperscript{25} Moreover, ownership of the books technically remained in the state, and in as much as the benefit was to the students and their parents, there was no direct financial benefit to the schools.\textsuperscript{26} Finally, because the books were required to be secular and nonreligious, the assumption was that the secular function being served was separable from the religious mission of the schools.\textsuperscript{27}

\begin{enumerate}
\item[	extsuperscript{20}] The so-called "child benefit" theory. Wilson, \textit{The School Aid Decisions: A Chronicle of Dashed Expectations}, 3 J. OF L. AND EDUC. 101, 102 (1974). This theory has often been invoked by defendants, but not always with success. Compare \textit{Everson} v. Board of Educ., 330 U.S. 1 (1947); Board of Educ. v. Allen, 392 U.S. 236 (1968); Mueller v. Allen, 463 U.S. 388 (1983) \textit{with} Wolman v. Walter, 433 U.S. 229, 250 (1977) (Court rejected the argument that loan of instructional materials and equipment was to students or parents and not to the schools); and Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 781 (1973) ("fact that aid disbursed to parents rather than to schools is only one among many factors to be considered").
\item[	extsuperscript{21}] \textit{E.g.}, Walz v. Tax Commission, 397 U.S. 664 (1970); Meek v. Pittenger, 421 U.S. 349, 359 (1975) (holding that Pennsylvania's textbook loan program was indistinguishable from that upheld in \textit{Allen}).\textit{reh. den.}, 422 U.S. 1049 (1975).
\item[	extsuperscript{22}] \textit{E.g.}, Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980) (sustaining statute that provided payment to nonpublic schools the costs of complying with certain state-mandated requirements, including reporting, recordkeeping and state-prepared testing); Tilton v. Richardson, 403 U.S. 672 (1971) (upholding construction grants for church-related colleges and universities); Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976) (sustaining annual noncategorical grants to private colleges, subject only to the restrictions that the funds not be used for sectarian purposes).
\item[	extsuperscript{23}] Board of Educ. v. Allen, 392 U.S. 236 (1968).
\item[	extsuperscript{24}] Sharply contrasted with the Court's attitude toward sectarian elementary and secondary schools has been its more lenient attitude toward sectarian institutions of higher learning. These are not viewed by the Court as "pervasively sectarian," and therefore absent is the need for a system of supervision to ensure that aid to these institutions (even direct money grants) is not being used to effect a religious end. Moreover, the Court emphasizes that college students are not as impressionable as young children, and that instruction in sectarian colleges is carried out in an atmosphere of academic freedom rather than religious indoctrination. \textit{See} Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).
\item[	extsuperscript{25}] \textit{Allen}, 392 U.S. at 243.
\item[	extsuperscript{26}] \textit{Id.} at 244.
\item[	extsuperscript{27}] \textit{Id.} at 244-248.
Since Allen, the Court has upheld other textbook programs on the basis of stare decisis,\textsuperscript{28} although it has been criticized for doing so.\textsuperscript{29}

In Aguilar v. Felton,\textsuperscript{30} the Court invoked the three-part test that it had developed from several major cases\textsuperscript{31} to test the validity of statutes challenged under the establishment clause. The test was first fully articulated in Lemon v. Kurtzman.\textsuperscript{32} To survive scrutiny, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion.'"\textsuperscript{33}

No school aid case\textsuperscript{34} has as yet been invalidated for violating the first prong of Lemon, the requirement of a legitimate secular legislative purpose.\textsuperscript{35} This stems primarily from a reluctance on the part of the Court to attribute unconstitutional motives to the states, especially when it can discern a plausible secular purpose from the face of the statute in question.\textsuperscript{36}


\textsuperscript{29} E.g., Wolman v. Walter, 433 U.S. 229, 257 (1977) (Marshall, J., concurring in part and dissenting in part, urging that Allen be overruled).

\textsuperscript{30} 105 S. Ct. 3232 (1985).

\textsuperscript{31} The first two prongs ("purpose and primary effect") first appeared in Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (a Pennsylvania law required at least ten verses from the Holy Bible to be read, without comment, at the opening of each school day in public schools; children were to be excused upon written request of their parent or guardian; the Court held this was a violation of the establishment clause). The third prong (entanglement) made its first appearance in Walz v. Tax Commission, 397 U.S. 664, 674 (1970) (upholding property tax exemptions to religious organizations, part of a broad class of property used for religious, charitable, or educational purposes; allowing exemptions would involve less entanglement than taxing the churches).

\textsuperscript{32} 403 U.S. 602, 612-613 (1971). In Lemon (decided together with Earley v. DiCenso and Robinson v. DiCenso), the Court struck down two separate statutes that authorized salary supplements for teachers and reimbursements to nonpublic schools for secular textbooks and instructional materials. While the Court concluded that the statutes had a valid secular legislative purpose, it nevertheless held that they violated the entanglement prong.

\textsuperscript{33} Id.

\textsuperscript{34} "School aid cases" refer to those establishment clause cases dealing with governmental programs that provide some type of aid (financial or in-kind) either to nonpublic schools or to parents of students in nonpublic schools. Although the majority of schools in this classification will be religiously affiliated, some nonreligious private schools may also be affected.


Rather, plans that have been struck down have run afoul of either the second\(^7\) or third\(^8\) prong, or both.\(^9\) Impermissible effect and entanglement have been found as a consequence of a consideration of one or more of the following factors: (1) inability to separate the secular functions of the institutions being served from their religious mission (this, in turn, will vary according to the nature of the aid provided,\(^10\) the nature of the institutions benefitted,\(^11\) and perhaps even the amount of aid\(^12\)); (2) breadth of the class benefitted;\(^13\) and (3) directness with which the schools are benefitted.\(^14\)

The school aid case most significant from the standpoint of Aguilar was the Court's decision in *Meek v. Pittenger*.\(^15\) There, the Court relied on *Lemon* and *Public Funds for Public Schools v. Marburger*\(^16\) to invalidate a portion of a Pennsylvania statute authorizing provision of "auxiliary services"\(^17\) to nonpublic school

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37. *E.g.*, Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (invalidating direct money grants to nonpublic schools for maintenance and repair of facilities, tuition reimbursement grants to parents, and income tax deductions for parents); Levitt v. Committee for Public Educ. and Religious Liberty, 413 U.S. 472 (1973) (striking down a $28,000,000 appropriation to reimburse nonpublic schools for costs of services mandated by the state, including administration grading and reporting of teacher-prepared tests; the Court refused to reduce the allotment to correspond to the costs of performing reimbursable secular services); Sloan v. Lemon, 413 U.S. 825 (1973) (parents' tuition reimbursement plan invalidated on same grounds as *Nyquist*, supra).


47. The auxiliary services included counseling, testing, psychological services, speech and hearing therapy, and related services for exceptional, remedial, or educationally disadvantaged students, "and such other secular, neutral, non-ideological services as are of benefit
students on the premises of the parochial schools. The Court held that an impermissible amount of entanglement would be required for Pennsylvania to be "certain" that the public employees did not advance the religious mission of the schools in which they were teaching. In addition, the Court refused to distinguish the Pennsylvania program from Lemon either because the plan before it involved remedial and not core curriculum courses, or because the teachers and counselors in Meek were public, rather than parochial school employees.

II. AGUILAR V. FELTON

A. The Plan

The program before the Court in Aguilar was developed by New York City to implement Title I of the Elementary and Secondary Education Act of 1965. The Act provides federal funds to local educational agencies which are responsible for developing programs to meet the needs of educationally deprived children. Such programs are subject to approval by state educational agencies and must meet the following requirements: (1) the children involved in the program must be educationally deprived; they must reside in areas with a high concentration of low-income families; and (3) the programs must supplement, not supplant, programs that would exist absent Title I funding. Title I was designed to reach educationally deprived children in both public and nonpublic schools. Although expenditures for each were to be equal, regulations issued by the Secretary of Health, Education and Welfare required that the types of services provided to each would be determined on a comparable basis. The Act itself provided:

To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who
are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate. . . . Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency. 54

The New York City Board of Education allocated funds between public and nonpublic school children according to a per capita formula based on the total number of public and nonpublic school students determined to be eligible for Title I services. 55 In 1981-82, the nonpublic school children benefitting from New York City's Title I program constituted 13.2% of the total. 56 The constitutional problem lay in the fact that the vast majority of these nonpublic school students attended religiously affiliated schools. 57

Aguilar is not the first case in which the Supreme Court has considered the constitutionality of Title I. In Flast v. Cohen, 58 federal taxpayers alleged that disbursement of federal funds to finance instruction and the purchase of educational materials for use in religious and sectarian schools was in contravention of the establishment and free exercise clauses. The Supreme Court declined to rule on the merits of the case, but held that the taxpayers had standing to invoke federal court jurisdiction for an adjudication on the merits. 59

In Wheeler v. Barrera, 60 parents of children attending nonpublic schools in Kansas City, Missouri, brought a class action, alleging that state school officials were arbitrarily and illegally approving Title I programs that deprived eligible nonpublic school children of services comparable to those offered to eligible public school children. At issue was the fact that state officials had refused to approve any allocation of money for teachers in parochial schools.

55. Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48, 51 (1984).
56. Id.
57. Id.
58. 392 U.S. 83 (1968).
59. Id. at 106.
during regular school hours, although they did approve teachers for after-school classes, weekends, and summers. The state had also approved the use of Title I funds for providing mobile educational services and various educational equipment to parochial schools. While the Supreme Court agreed with the Eighth Circuit that the Act required nonpublic school children be furnished services comparable (but not identical) to those provided in public schools, it was careful to point out that this did not mean state and local agencies must submit and approve plans that employ the use of Title I teachers on private school premises during regular school hours. On remand, such agencies were left the option for providing on-premises instruction if they so chose. However, the Court did not rule on the constitutionality of on-premises instruction; because no order had been entered requiring it, the issue was not ripe for review.

New York began providing remedial instruction and related counseling services under Title I to parochial students on the premises of the parochial schools during regular school hours only after other alternatives had failed. The City Board of Education had at first attempted to provide services to nonpublic school students at public schools after school hours. Because attendance was poor, the Board transferred some Title I classes to nonpublic schools after school hours. Under both plans, parents were concerned about the safety of their children, the children were inattentive, teachers were tired, and there was little communication between the Title I staff and the regular classroom teachers. A plan was rejected that would have provided services to nonpublic students at public schools during school hours as there was some question as to its constitutionality under Article XI of the New York Constitution. All Title I classes were taught by public employees. Unlike the Grand Rapids program, New York had a system of safeguards to assure that religion did not infiltrate the Title I classes. Under the plan, teachers' assignments were made by the City Bureau. The teachers were supervised by field personnel and program coordinators, both of whom paid occasional unannounced visits to the Title I classes. The teachers were in-

61. Id. at 415.
62. Id. at 426.
63. Brief for Appellant Chancellor at 6, Aguilar.
64. 105 S. Ct. 3216 (1985).
structed to bar any religious materials and symbols from their classrooms, and to avoid involvement with religious activities that might be conducted in the schools, and to keep contact with parochial school personnel to a minimum. The court below conceded that the city had been largely successful in its efforts to prevent the public school teachers and other professionals from giving sectarian instruction or otherwise fostering religion, and that the record was devoid of any recorded complaint by Title I teachers of interference by nonpublic school authorities.

Despite this record, in 1978 six federal taxpayers brought suit in federal district court, challenging the constitutionality of funding programs involving on-premises instruction in parochial schools. The case was stayed pending the outcome of an earlier case, National Coalition for Public Education and Religious Liberty v. Harris, ("PEARL") that had been filed in another federal district court. The court in PEARL found that New York's Title I program, as carried out, did not violate the establishment clause and dismissed the complaint. The district court in the instant case agreed with PEARL, and relying on the record developed in that case granted defendants' motion for summary judgment and dismissed the complaint. The Second Circuit Court of Appeals unanimously reversed the district court's order. Relying primarily on the Supreme Court's decision in Meek v. Pittenger, the court held that "public funds can be used to afford remedial instruction or related counseling services to students in religious elementary and secondary schools only if such instruction or services are afforded at a neutral site off the premises of the religious school."

The court rejected defendants' argument that evidence of the actual workings of New York's plan indicated that the plan had not advanced religion; the court pointed out that this decision, like Meek, was grounded not in the effect prong of the Lemon test, but rather its entanglement prong. The court used this latter reasoning to reject defendants' argument that the Government's assuming the burden of remedial instruction is only "indirect" or "incidental" advancement. The court maintained that to relax Meek's ban

65. Felton, 739 F.2d at 49.
66. Id. at 53.
68. Felton, 739 F.2d at 49-50.
70. Felton, 739 F.2d at 64.
71. Id. at 65.
on sending public school teachers into religious schools would "let
the genie out of the bottle." 72 "Considerable segments of the cur-
riculum of the religious schools could be turned over to public school
teachers, working in classrooms denuded of religious symbols and
with 'state inspectors prowling the halls of parochial schools and
auditing classroom instruction.'" 73

The court further asserted that the appearance of public school
teachers in religious schools would take on a symbolic significance:
that, in essence, the government would be appearing to place its
official support behind the tenets of one or all orthodoxies. 74

Finally, the court rejected defendants' argument that the
religious schools involved were not predominantly sectarian as were
those in Meek, but rather, were like the four colleges in Roemer
v. Maryland Public Works Board. 75 While the court acknowledged
that most of the schools did not have all of the characteristics in
Meek, it nevertheless maintained that "[i]f any significant number
of the Title I schools create the risks described in Meek, Meek ap-
plies." 76

B. The Court's Reasoning

In applying the Lemon test to New York's Title I program, the
Court did not question the legitimate secular purpose of the Act.
The district court had reviewed the text of the statute and its
legislative history and had concluded that it served the secular
purpose of aiding needy children regardless of where they attended
school. 77 This finding was not disputed by the court of appeals,
and was not challenged by the parties before the Court. 78

The legislative history of Title I indicated its purpose was to
meet the nationwide problem of the plight of educationally deprived
children. Low income areas had a disproportionate rate of educa-
tional deficiencies as evidenced by draft rejection and unemploy-
ment rates, and manpower retraining problems. 79

72. Id. at 67.
73. Id. (quoting Lemon at 650).
74. Id.
76. Felton, 739 F.2d at 70.
77. Aguilar, 105 S. Ct. at 3244 (O'Connor, J., dissenting).
78. Id.
79. S. REP. No. 146, 89th Cong., 1st Sess. 12, reprinted in 1965 U.S. CODE CONG. & AD.
NEWS 1446, 1449.
Recognizing the close relationship between conditions of poverty and lack of educational development and poor academic performance, Congress sought to provide full educational opportunity to every child regardless of economic background.80

While the Act did not authorize the provision of services to private institutions (e.g., the purchase of materials or equipment, or the construction of facilities), it was the intent of Congress that local educational agencies broaden public school programs to include children not attending public schools.81 It was anticipated that one of the options open to the local agency in designing a suitable program for private school children was the provision of on-premises instruction.82 The circumstances under which this type of service would be appropriate is outlined in the Senate Report:

It is anticipated, however, that public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the public school.83

The Supreme Court summarily disposed of the second prong of Lemon by remarking that "[a]t best, the supervision . . . would assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school."84 This remark followed on the heels of the observation by the Court that the program here was very similar to those struck down in Grand Rapids. Instead of invalidating the New York program on the same grounds, however, the Court chose instead to seize upon its system of supervisory safeguards, and disposed of it on entanglement grounds.

The Court found present in Aguilar the same critical elements of entanglement that had been fatal to the statutory schemes in Lemon and in Meek. This was primarily due to a combination of two factors: the nature of the schools and the nature of the aid.

1. Nature of the Schools

Invoking the profile of sectarian schools that had first appeared

80. Id. at 1450.
81. Id. at 1456-57.
83. S. REP. No. 146, at 1457.
84. Aguilar, 105 S. Ct. at 3236-3237.
in *Lemon*, the Court agreed with the Second Circuit that the elementary and secondary schools involved were "pervasively sectarian," and had "as a substantial purpose the inculcation of religious values" similar to those in *Committee for Public Educ. v. Nyquist.* In *Nyquist*, the Court outlined the factors that comprise this profile of sectarian schools. Such schools could be those that

(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach.  

In addition, *Lemon* had enumerated some of the factors that made a parochial school constitute an integral part of the religious mission of the church sponsoring it. Among these are that church schools are located close to parish churches, school buildings contain identifying religious symbols, schools maintain religiously oriented extracurricular activities, and a majority of the teachers are nuns of various religious orders. The Court in *Lemon* noted that the process of inculcating religious doctrine is enhanced by the impressionable age of the pupils, particularly in primary schools. In *Aguilar*, the Court therefore relied on its earlier holding in *Meek*, which had rested on the ground that publicly funded teachers were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." Moreover, the Court rejected appellants' argument that the degree of sectarianism may vary from school to school. It agreed with the court below that "[i]f any significant number of Title I schools create the risks described in *Meek*, *Meek* applies."  

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85. *Felton*, 739 F.2d at 68-70.
87. 413 U.S. at 767-68.
90. *Aguilar*, 105 S. Ct. at 3238 n.8. See supra notes 75-76 and accompanying text.
Thus, the elementary and secondary schools at issue in *Aguilar* were contrasted by the Court with the sectarian colleges in *Roemer, Hunt* and *Tilton*, in which various forms of aid to those institutions were allowed. In those cases, the common element for a non-entangling aid program was the ability of the state to identify and subsidize the secular functions of the schools without the necessity for on-site inspections; in addition, college students were not thought to be as impressionable and therefore not as susceptible to religious doctrine as elementary students. By contrast, the Court concluded that New York’s program would require “a permanent and pervasive State presence” in the schools receiving Title I funds.

2. Nature of the Aid

Because the assistance provided by the Title I programs was in the form of teachers and other professionals, the Court found the same problems of entanglement that had existed in *Lemon*. The Court has held that teachers are not nonideological or religiously neutral; therefore, to prevent permeation of the secular by the sectarian, a “comprehensive, discriminating, and continuing state surveillance” would be required. This day-to-day relationship, coupled with the administrative cooperation that would be necessary, would, the Court felt, violate the policy of neutrality. The two major dangers thus thought to be avoided, then, were the potential for political divisiveness and “governmental secularization of a creed.”

C. Other Opinions

In a concurring opinion, Justice Powell emphasized more strongly...

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92. *Roemer v. Public Works Board of Maryland*, 426 U.S. 736 (1976) (finding that private colleges and universities were not “pervasively sectarian” and because aid was thus extended only to the secular functions, upholding the annual noncategorical grants); *Hunt v. McNair*, 413 U.S. 734 (1973) (allowing issuance of revenue bonds for construction of facilities in institutions of higher learning, including those with religious affiliations); *Tilton v. Richardson*, 403 U.S. 672 (1971) (sustaining federal construction grants for college and university facilities, except for a twenty-year limitation on religious use of the facilities).

93. *Aguilar*, 105 S. Ct. at 3238.


95. *Id.* at 619.

96. *Aguilar*, 105 S. Ct. at 3239.

97. *Id.*

98. *Id.*
than did the majority the potential political divisiveness factor which justified invalidation of the program on entanglement grounds. He also more explicitly stated that the program violated the second prong of *Lemon*. This was so, he felt, for two reasons: the program relieved the parochial schools "of the duty to provide the remedial and supplemental education their children require," 99 and because of the substantial amount of aid involved and the religious nature of the schools, the result is "direct and substantial advancement of religious activity," 100 as in *Meek*.

Justice O'Connor answered the former effect argument in the longest and most thoughtful of four separate dissents. She pointed out that *Wolman v. Walter* 101 allowed remedial assistance to parochial schools, albeit at neutral sites off the premises of the schools. Unless *Wolman* was incorrectly decided, she asserted, there is no logical reason why a remedial program on school premises is any more likely to supplant the secular course offerings than the same classes at a neutral site. Justice O'Connor also questioned the validity of entanglement as a separate establishment clause standard in most cases, but nevertheless asserted that if it were to be applied, New York's program did not violate it. 102

III. ANALYSIS

To fully understand the Court's current approach to the issue of aid to parochial schools vis-a-vis on-premises instruction, it is helpful to read *Aguilar* with its companion case, 103 for together they illustrate how the Court has used the paradoxical structure of the *Lemon* test to systematically close off every avenue of escape for parochial schools seeking such assistance.

So far a bare majority of the Court has reaffirmed its position that it will not allow public funds to be used to subsidize public employees for performing educational services on parochial school grounds under any circumstances. What remains to understand is the underlying policies sought to be served, and why a majority of the Court continues to adhere to the *Lemon* test, particularly

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99. Id.
100. Id. (Powell, J., concurring).
102. Id. at 3243.
since it has failed to produce either a workable standard for legislatures, or consistent results.

The Court seems to fear that the appearance of subsidizing any type of aid that touches too nearly upon the religious inculcation process of parochial schools is too politically divisive; that perhaps it would appear to be aligning itself with a particular faith. At any rate, the Court seems to feel most comfortable with the lines drawn at allowing general welfare benefits on the one hand, and denying aid to educational services on the other. The only anomaly to this theory has been the Court’s stance regarding the loan of textbooks, rooted in Allen v. Board of Education, and subsequently maintained on the basis of stare decisis. Indeed, some members of the Court have strongly urged that Allen be overruled.

In Aguilar, the Court gave precedential weight to its prior decisions in Lemon and Meek, cases in which it disallowed on-premises instruction. However, it overlooked the fact that the Title I program before it contained the same elements that have justified upholding other statutory schemes. For example, Title I funds are available to a broad class of beneficiaries, nonpublic and public students alike. In addition, the students, not the schools, are the direct beneficiaries of the program. The major distinguishing factor is that the program does not fall within the category of general health and welfare legislation.

Although the Lemon test has been criticized for its failure to yield consistent, predictable results, it has proved to be a useful tool with which the Court can engage in “ad hoc decision-making.” The Court has candidly admitted that under the test it has “sacrificed clarity and predictability for flexibility.” In Aguilar, the Court demonstrated once more the efficacy of this no-win system for invalidating any type of aid it feels may be improper. Fatal to New York’s Title I program were its very efforts to avoid hav-

104. The primary beneficiaries of Title I funds were Roman Catholic schools, comprising 84% of the private schools eligible.
ing the impermissible effect of advancing religion. The state and parochial schools thus find themselves inextricably enmeshed in a dilemma described by Justice White in his dissenting opinion in *Lemon* as "an insoluble paradox":110

The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught — a promise the school and its teachers are quite willing and on this record able to give — and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence.111

Virtually any attempts to form a cooperative effort between the school and the state toward the effect prong, then, will doom the plan. The only remaining alternative for parochial schools is off-site aid. However, as Justice O'Connor pointed out in her dissent in *Aguilar*, there are those schools for whom it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school.112 Moreover, it is difficult to discern a basis in logic or reasoning for maintaining this distinction, for there is no reason to believe that public employees are more likely to inject religion into their secular classes merely by stepping foot onto parochial school premises. Nevertheless, the Court has decided it will not go beyond this point when teachers are the type of aid sought to be provided by the state — public employees may offer secular services to nonpublic school students only so long as these services are offered off school premises.

Justice O'Connor's dissenting opinion in *Aguilar* exemplifies the disaffection with which some members of the Court view the anti-entanglement principle. Commentators have charged that it has not only posed the greatest obstacle for aid to parochial schools,113 but has also effected conceptual chaos.114 The Court itself has at times described it as only a "guideline,"115 and "no more than a helpful signpost."116

111. Id.
114. Id. at 681.
The concept first appeared in *Walz v. Tax Commission*, a case involving a challenge to property tax exemptions offered to religious organizations that were part of a broader class of property used for religious, educational, or charitable purposes. Faced with the long history of such exemptions, and the fact that there had never been a sign that allowing them was a step toward establishing a religion, the Court upheld the statute, reasoning that the exemptions would mean a lesser involvement between the church and government than would taxing the churches.

The entanglement seed planted in *Walz* came to fruition in *Lemon*, a school-aid case in which the Court first fully articulated the three-part test, and the entanglement principle thus became a separate constitutional standard. However, Justice Rehnquist has pointed out that when divorced from the logic of *Walz*, the result in school aid cases is the "insoluble paradox" spoken of by Justice White. Justice Rehnquist has also criticized the test as a failed "effort to craft a workable rule from an historically faulty doctrine"; that is, that there is no historical basis for the theory of strict separation between church and state which is the doctrinal underpinning of the anti-entanglement principle. Nevertheless, the theory today remains a viable part of establishment jurisprudence, as evidenced by the Court's most recent pronouncement in *Aguilar*.

One of the dangers the Court perceived in New York's Title I program was that administrative personnel of public and parochial schools would have to work together in resolving matters related to schedules, classroom assignments, problems, student progress, etc. Such frequent contacts would produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." The flaw in this reasoning can be traced back to *Everson v. Board of Education*, where Justice Black equated a policy

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118. Wallace v. Jaffree, 105 S. Ct. 2479, 2518 (1985) (Rehnquist, J., dissenting). Justice Rehnquist explains that *Walz* dealt with a broad survey of the historic relationship between state taxation and religious property, and that the entanglement inquiry was consistent with that survey.
119. Id.
121. *Aguilar*, 105 S. Ct. at 3239.
of strict separation (i.e., no contact with religion) with neutrality between religion and irreligion. However, perhaps not fully comfortable with this extreme stance, he justified extending some aid to religious schools by reasoning that allowing all students to share in general government benefits is not support of religion.\textsuperscript{123}

The Court has since then recognized that a total separation between church and state is not possible:

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly.\textsuperscript{124}

This statement recognizes that a policy of strict separation may not in fact be neutral, but may instead result in hostility toward religion.\textsuperscript{125}

The \textit{Aguilar} Court offered as justification for the anti-entanglement principle the theory that when the state becomes involved with a denomination in matters of religious significance, the freedom of religious beliefs of both non-adherents and adherents of that denomination suffers. Religious autonomy is the underlying purpose shared, at least ostensibly, by the religion clauses.\textsuperscript{126} It must be remembered, however, that the clauses were drafted at a time when government was one of narrowly limited powers,\textsuperscript{127} and it was believed that the best way to achieve individual autonomy was to keep the government totally out of religious affairs.\textsuperscript{128} The expansion of government into all phases of life in today's complex society has not surprisingly created new tensions between the two clauses.\textsuperscript{129} The Court has maintained a constant struggle to "find a neutral course between the two ... [c]lauses, both of which are cast in absolute terms, and either of which, if

\textsuperscript{123} Id. at 16-18.
\textsuperscript{126} \textit{See generally} L. TRIBE, \textit{AMERICAN CONSTITUTIONAL LAW} § 14-1 (1978).
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
expanded to a logical extreme, would tend to clash with the other."\textsuperscript{130}

The trouble with the Court's argument in \textit{Aguilar} is that it overlooks the fact that to deny children secular benefits neutrally available to all merely because of their religious affiliation is in itself an inhibition of their free exercise of religious beliefs. This is particularly true for low-income families, for whom it is difficult to exercise much freedom of choice in educational matters. For those who live in areas where it is not feasible to provide off-site public facilities for remedial education, their children will be forever deprived of these purely secular benefits.\textsuperscript{131}

Moreover, as pointed out by Justice White in \textit{Lemon}, parochial schools are not coerced in any way into accepting the proffered assistance.\textsuperscript{132} Nor could he see how the free and voluntary agreement between church and state to use funds to teach only secular subjects is a violation of free exercise.\textsuperscript{133}

\textbf{A. The Actual vs. the Hypothetical Approach}

The Court's handling of the record before it in \textit{Aguilar} further shows the curious manner in which the second and third prongs of \textit{Lemon} interact. Not only are the states caught up in a no-win game whereby any steps to avoid the effect prong will cause them to run afoul of the entanglement prong, but because of the hypothetical manner in which the entanglement prong has been applied, the Court is free to ignore the facts before it, even where they indicate that there has been no injection of religion into the Title I classes, and that the supervision necessary to achieve this result has not been excessive.

In \textit{Aguilar}, the trial court found as a matter of fact that "the result feared in other cases has not materialized in the city's Title I program. The presumption — that the 'religious mission' will be advanced by providing educational services on parochial school premises — is not supported by the facts of this case."\textsuperscript{134} The Court found that there had not been a single incident in which a Title

\textsuperscript{131} Aguilar, 105 S. Ct. at 3248 (O'Connor, J., dissenting).
\textsuperscript{133} Id.
\textsuperscript{134} Aguilar, 105 S. Ct. at 3245 (O'Connor, J., dissenting) (quoting from Harris, 489 F. Supp. at n.67).
I instructor had attempted to indoctrinate students in religious beliefs. Moreover, the Second Circuit had conceded that the program had done "much good and little, if any, detectable harm." Despite these findings, the Supreme Court relied on a hypothetical amount of supervision that it felt might be necessary to prevent impermissible effects, and declined to allow the record to refute this assumption. In so doing, the Court accepted appellees' contention that the potential for excessive entanglement was sufficient to void the program; proof of actual entanglement was not necessary. In fact, the taxpayers even had conceded that the degree of surveillance in the New York system was minimal. The appellants were thus correct when they charged that a purely hypothetical approach to both effects and entanglement has the result of invalidating any assistance program. These sentiments were echoed by Justice Rehnquist's words:

"[I]f the Court is free to ignore the record, then appellees are left to wonder, with good reason, whether the possibility of meeting the entanglement test is now anything more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will.""

B. Nature of the Aid — Parochial vs. Public Employees

The Court has heretofore refused to recognize a distinction between instruction provided by parochial school teachers and that provided by public school employees; yet there is a fundamental difference between the two situations. The risk that religion might be fostered by teachers was first identified in Lemon. There the Court pointed to the danger that full-time religious teachers under religious control and discipline posed to the separation of the religious from the secular aspects of education. By contrast, public employees are not answerable to any religious authority and are therefore less susceptible to succumbing to the sectarian atmosphere of the schools in which they work. This is particularly

135. Id.
136. Felton, 739 F.2d at 71-72.
137. Brief for Appellees at 20, Aguilar.
138. Brief for the Secretary of Education at 36, n.27, Aguilar.
139. Id. at 39.
true where, as in *Aguilar*, the majority of the teachers are itinerant, and almost three-quarters do not share the same religious affiliation as their students. Consequently, the degree of supervision that would be required is necessarily greatly reduced.

The Court in *Aguilar* reiterated that the underlying objective of the anti-entanglement principle is to "prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other." It is difficult to see, however, how surveillance of public school teachers by public authorities is a constitutionally impermissible intrusion into religious affairs. Furthermore, it has been pointed out that the fact that the surveillance takes place within the religious institution is not crucial; the Court seems to ignore the fact that religious schools undergo surveillance on a regular basis to assure their compliance with curriculum and attendance laws, and fire and building regulations.

Three years after *Lemon* was decided, the Court intimated that it would be willing to recognize the constitutional difference between parochial and public school employees. In *Wheeler v. Barrera*, the Court considered a challenge to the manner in which Title I funds were being administered. Though declining to pass on the precise issues before it, the Court nevertheless did hold that Title I mandates comparable, although not identical, provisions for nonpublic students as for public school students. The case was therefore remanded so that local and state agencies could devise and approve plans that would meet this comparability requirement. The Court went on to say in dictum:

[A] program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week. At this time we intimate no view as to the Establishment Clause effect of any particular program.

143. *Id.* at 3239 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).
144. *The Supreme Court, 1974 Term, 89 Harv. L. Rev. 47, 108 (1975).*
145. *Id.*
146. *Id.*
148. *Id.* at 426.
The next year, however, the Court firmly closed the door on this possibility in *Meek v. Pittenger*.\(^{149}\) Striking down Pennsylvania's on-premises auxiliary services plan, the Court indicated that the need for continuing surveillance was not eliminated because the teachers and counselors were public employees. They were, in the words of the Court, "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."\(^{150}\) In *Aguilar*, the Court expressly denied that *Wheeler* provided any authority for the case at bar.\(^{151}\)

The Court has often relied on *Lemon*'s language that says a state "must be certain . . . that subsidized teachers do not inculcate religion."\(^{152}\) Perhaps the Court did not mean for that statement to be taken literally, however, for certainty is an impossible standard for parochial schools to meet.\(^{153}\) A more realistic standard would be that state aid is only barred when there is a "reasonable probability" that state-subsidized employees would engage in indoctrination.\(^{154}\) Under this standard, sending public employees into parochial schools to teach secular remedial courses a few hours a week would be constitutional, for the chances of succumbing to the "sectarian atmosphere" would be greatly reduced.

**IV. CONCLUSION**

*Aguilar*'s off-premises requirement will not prove to be fatal for all governmental assistance programs, but it may seriously hamper efforts to achieve educational equality in some areas. More importantly, *Aguilar* is a useful illustration of how Congress, state legislatures, and the Supreme Court itself have all struggled to deal with the seemingly irreconcilable criteria of the *Lemon* test.

Almost everyone will agree that public funds should not be used to advance the religious mission of parochial schools. To this end,

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150. *Id.*
151. *Aguilar*, 105 S. Ct. at 3234 n.3.
154. *Id.* at 108-09.
the first and second prongs of *Lemon* are effective and relatively simple standards by which to measure governmental aid programs.

Most would agree equally with the general principle that the church and state should not be unduly involved with or dependent upon one another. However, as it has been applied by the Court, *Lemon*'s entanglement principle by contrast has proven to be neither effective nor simple. As such, it should be rejected as a separate constitutional standard and replaced by a common sense approach to separation, one more consonant with the reality of circumstances as they exist today. There is no longer a way to avoid some contact between the state and nonpublic schools, and a strict separationist view ignores this fact and so fails to concentrate on what should be the major focus of concern, that is, avoidance of advancement of religion by the public fisc. One might strenuously argue that a common sense approach is too nebulous a standard with which to leave the Court. The simple answer to this argument is, of course, that the Court has heretofore freely engaged in ad hoc decision making in its establishment clause jurisprudence.

The hypothetical way in which the Court has applied the entanglement principle has allowed it to ignore the facts before it, even when there has been no advancement of religion (for example, by injection of religion into secular classes) and when the amount of supervision necessary to avoid this has not been excessive. Moreover, so far the Court has refused to recognize the difference between sending public employees into parochial schools to offer secular services, and allowing parochial teachers to do the same. The former situation necessarily reduces the degree of supervision necessary to avoid the advancement of religion, for public employees are not under the supervision or control of parochial school authorities, and are therefore not likely to succumb to the religious atmosphere of the schools in which they teach.

The "insoluble paradox" created by *Lemon* may prevent some parochial students from enjoying on an equal basis purely secular benefits otherwise neutrally available to other children. A denial to any of these children benefits offered by our society that have nothing at all to do with religion is not a neutral stance, but rather one that reflects hostility toward religion, and works a discrimination in favor of nonreligion. At the same time, this frustrates one of the underlying policies of the religion clauses, that of religious autonomy; for while the Court continues to struggle to reach a
consensus regarding the *Lemon* test and the degree of separation between Church and State mandated by the religion clauses, some parents may feel compelled to forego a religious education for their children, or deprive them of badly needed, secular services that are otherwise available to all.

In the meantime, it seems as if legislatures have exhausted their options in attempting to meet the stringent criteria set out by the Court. As long as the Court continues to adhere to the profile of the "pervasively sectarian" elementary and secondary schools, refuses to recognize the difference between public programs administered by public employees and those by parochial personnel, and insists on the unrealistic "certainty" standard of *Lemon*, parochial students will remain caught in the web of the Court's "insoluble paradox."

As an increasing number of assistance programs continue to be invalidated for failing to pass constitutional muster, the Court may well find that the "political divisiveness" it has sought to avoid may instead become a reality.

**Shawn M. Young**