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Politics and Due Process Don't Mix: Should the State Claims Commission Be Abolished?

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The sovereign is said to be *exempt from the law*, as to its coercive power; since, properly speaking, no man is coerced by himself, and law has no coercive power save from the authority of the sovereign. Thus then is the sovereign said to be exempt from the law, because none is competent to pass sentence on him, if he acts against the law. Wherefore, Ps. L. 6: *To thee only have I sinned*, a gloss says that *there is no man who can judge the deeds of a king*. — But as to the directive force of law, the sovereign is subject to the law by his own will, according to the statement that *whatever law a man makes for another, he should keep himself.*

— Thomas Aquinas,
Summa Theologica (1266)[1]

I. Introduction

In the 1985 legislative session, the Arkansas General Assembly considered the possibility of abolishing the Arkansas State Claims Commission—the state Commission responsible for hearing claims against the state. The issue enveloped the Commission in a swirl of political controversy, at the center of which were former Commission chairman, Herby Branscum, Jr., and state Senator Max Howell. The legislative session ended with the Commission somewhat reconstituted but still alive; like all things legislative the solution was the product of political compromise. The *Arkansas Gazette* neatly summarized the entire controversy in one paragraph:

> Howell had led the Senate effort to abolish the Commission, which considers claims against the state alleging such things as negligence, wrongful death or property loss. He said the Commission had operated ineffectively, allowing backlogs, and later began to allege that the Commission chairman, Herby Branscum Jr. of Perryville, a former chairman of the Democratic State Committee, had been too political in the consideration of claims. Howell initially had wanted to replace the Claims Commission with committees of legislators. Branscum said Howell was angry over the treatment of two claims his law firm had before the Commission.[2]

Whether the *Gazette's* summary of the political debate surrounding the Commission is perfectly accurate is really not, in the long scheme of things, important. What is important is that there was a political controversy at all—for the very existence of the political squabble over the Commission's performance revealed a fundamental fact of life about the State Claims Commission: the Commission is in theory and function an agent of the legislature, and as such is inherently a creature of politics. Although the Commission ostensibly "adjudicates" individual claims against the state and operates with the trappings of a judicial body, using procedural and evidentiary rules that are less formal but nonetheless analogous to the rules observed by the courts, the Commission's lines of power run directly to the legislature. In the scheme of the state's organizational structure, the Commission has historically been conceived as an agency of convenience, "created to represent the state's conscience,"[3] functioning to assist the legislature in the exercise of legislative authority.[4] Thou art made of politics, and unto politics thou shalt return.

This article is a critique of the State Claims Commission, and a plea for reform. The critique is not *ad hominem*—it has nothing whatever to do with the personal competence or performance of the Commissioners. Nor is the critique grounded in the historical fact that the General Assembly has frequently dealt with the Commission in a political fashion, for the General Assembly is by nature a political institution and its members cannot help but exercise their roles in political terms—that is what we elect them to do. My argument is instead more basic: the Claims Commission approach to handling claims against the state is conceptually flawed. No matter how conscientious and able the men and women appointed to the Commission may be, they function in a setting inherently in tension with values of due process and economic efficiency. To attack the Commission is thus not to attack the Commissioners. A Commission composed of Oliver Wendell Holmes, Learned Hand, and Benjamin Cardozo would still be incapable of justly deciding claims against the state, because of deficiencies inherent in the Commission's role in the structure of Arkansas government.

This article first briefly summarizes the Commission's historical place in Arkansas state government, a place that is inextricably intertwined with the provision in the Arkansas Constitution that creates sovereign immunity from suit against the state in any of her courts. The underpinnings of this structure are then criticized from three analytic perspectives: (1) modern due process analysis; (2) a political/philosophical analysis; and (3) an economic efficiency analysis. A relatively radical reform is then suggested: Arkansas should, by constitutional amendment, waive sovereign immunity, consenting on a **limited** basis to suit in her courts, following a model similar to the Federal Tort Claims Act,[5] an approach now in existence in many sister states.[6]

II. The Historical Role and Function of the State Claims Commission

A. An Historical Overview

The Arkansas Constitution of 1836 did not immunize the state from suit in her courts,[7] and in 1837 the General Assembly provided for suits in law and equity against the state.[8] The Arkansas Supreme Court upheld the statutory authorization of suits against the state in 1851.[9] In the Constitution of 1874, however, sovereign immunity became part of the fabric of Arkansas constitutional law, through the declaration in Article 5, Section 20: "The state of Arkansas shall never be made defendant in any of her courts."[10] This provision in the Constitution of 1874, however, has always coexisted with another constitutional provision, in Article 16, Section 2, which directs that: "The General Assembly shall from time to time provide for the payment of all just and legal debts of the State."[11]

The original approach followed by the General Assembly to reconcile these two constitutional commands was the simple expedient of private legislation recompensing individuals with claims against the state. A citizen with a contract or tort claim against the state would seek relief through a special act passed by the legislature.[12] As the number of these private bills grew, it became increasingly difficult to give each claim individual legislative attention, and the General Assembly resorted to "Omnibus Claims Bills," incorporating in one act of legislation all claims appearing in a legislative session.[13] Beginning in 1933, the actual task of investigating the merits of claims and forwarding recommendations to the General Assembly was delegated biannually to the precursors of the modern Claims Commission, a series of provisional claims commissions established in each session to do the actual administrative work of investigating claims. The first of these claims commissions consisted of three members: the State Comptroller, State Auditor, and Attorney General.[14] (The composition of this early version of the Claims Commission is itself revealing—notice that no qualms about any conflict of interest were apparently in the consciousness of the legislature, despite the fact that the claims for financial relief against the state would be "judged" by persons who by disposition and official function would be intrinsically biased in favor of the state.) For a brief period beginning in 1945 these ad hoc commissions were replaced by the Board of Fiscal Control.[15]

In 1949, motivated by a desire to create a system less blatantly subject to political influences and better able efficiently to resolve claims against the state, the General Assembly created a permanent State Claims Commission.[16] The Commission was comprised of three members appointed by the Governor for six-year terms; two of the three Commissioners were required to be attorneys. Under the Commission's procedures, immediate payment of claims under $2,000 approved by the Commission were provided for, but claims exceeding $2,000, once approved by the Commission, were submitted to the next regular session of the General Assembly, and were not paid until the General Assembly gave them final approval and authorized the appropriation of funds.[17]

In the 1985 legislative session, the structure of the Commission was again reconstituted, with its

membership increased from three Commissioners to five.[18] The terms of office of the Commissioners who were serving on March 1, 1985 were abruptly terminated, effective July, 1985, with five new appointees replacing them.[19] The 1985 statute stated specifically that: "This Act does not abolish the State Claims Commission created by Act 276 of 1955, nor does it repeal Act 276 of 1966, as amended, except the provisions establishing the number of Commissioners and their terms of office."[20]

B. A Conceptual Overview

The history of the Claims Commission in Arkansas demonstrates that the function of the Commission has always been conceived as intimately related to the doctrine of sovereign immunity. The doctrine of sovereign immunity is in turn so deeply ingrained in the consciousness of American lawyers that we reflexively accept it as a given, as part of the natural order of things. Out of this habit of mind, the American lawyer almost cannot conceive of a legal universe in which the doctrine of sovereign immunity is not accepted as a fixed constellation. To suggest that the sovereign does not enjoy absolute freedom to choose for itself whether it wishes to consent to suit in its own courts is to suggest a radical proposition as repulsive to the training and instincts of lawyers today as it was a century ago.

In *Beers v. State of Arkansas*,[21] for example, decided in 1857, the plaintiff brought an action in Pulaski County Circuit Court against the state for interest due on certain state-issued bonds. Arkansas' Constitution did not at that time period bar suits against the state, and the General Assembly had established procedures governing such suits, but the plaintiff nonetheless complained that a state statute passed after his case had been filed had placed new procedural barriers to his claim that had not existed at the time the action was filed. The case ultimtely reached the United States Supreme Court; Chief Justice Taney dismissed the plaintiff's claim with almost cavalier dispatch, for the whole idea that one could complain about conditions imposed on the privilege to bring suit against the state ran directly against the doctrine of sovereign immunity, a doctrine that Taney seemed to see as an inevitable tenet of any civilized jurisprudence:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent or permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.[22]

Since the nineteenth century, the doctrine of sovereign immunity has been woven deep into the fabric of Arkansas law.[23] A booklet published by the Arkansas Claims Commission distills the history of sovereign immunity in one neat paragraph:

> The doctrine of sovereign immunity originated in England and has since been ingrained in the Common law of every State. Conceived and adopted in a time when it was considered a necessary financial protection for governments, the doctrine exists in each state unless legislatively or judicially abrogated.[24]

This paragraph somewhat understates the case, however, for the justification of the doctrine in America has not merely been a blind adoption of the pre-sixteenth century English maxim that "the king can do no wrong,"[25] nor has it been grounded exclusively in the argument that it is necessary to the "financial protection of governments."[26] Rather, the doctrine of sovereign immunity in American jurisprudence rests primarily on a more profound conceptualization of the meaning of "law" itself: the sovereign is the creator of all law; no cause of action exists except as the sovereign chooses to create it; and if the sovereign chooses to create no cause of action against itself, there is literally no law in existence upon which a suit may be predicated. There is no more succinct statement of this theory than that of Justice Oliver Wendell Holmes, in *Kawananakoa v. Polyblank*,[27] a case raising the issue of whether the territory of Hawaii could assert sovereign immunity as a bar to suit against the territory. In arguing on behalf of Hawaii, the attorney for the territory defended the doctrine of sovereign immunity by maintaining that: "*In the very nature of things*, the creator is not, save with its own consent, under the dominion of its creature; the power which creates tribunals must of necessity be superior to their jurisdictions."[28] Justice Holmes could not have agreed more, and in writing for a unanimous Supreme Court he spoke of the justification for sovereign immunity as grounded in this raw and literal power of the sovereign to create all law, invoking the political philosophy of Thomas Hobbs:

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer

has been public property since before the days of Hobbes. (Leviathan, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.[29]

This conceptual justification for the doctrine of sovereign immunity is an application of the right/privilege distinction, or the so-called "privilege doctrine:"

> The privilege doctrine is grounded in a dichotomy between "rights" (interests enjoyed "as a matter of right") and mere "privileges" (interests created by the grace of the state and dependent for their existence on the state's sufferance). Privileges can be primarily economic interests, such as public jobs, welfare benefits, or licenses, or primarily noneconomic interests, such as early release from imprisonment through pardon or parole, or permission for an alien to enter the country. According to the doctrine, governmentally created "privileges" may be initially given to recipients on the condition that they surrender or curtail the exercise of constitutional freedoms that they would otherwise enjoy. Further, those privileges may be denied to or withdrawn from recipients without affording them the procedural due process protections that would normally attach to the denial or the taking of "rights."[30]

By sheer force of historical momentum American law has labeled the bringing of suit against the state as a "privilege" rather than as a "right," and that privilege exists solely at the grace of the state.[31]

III. A Critique of the Claims Commission Approach to Handling Claims Against the State

A. Sovereign Immunity and Due Process

If the foundation stone of the Claims Commission is the doctrine of sovereign immunity, any direct due process assault on the structure of the Claims Commission must first contend with the immunity doctrine. The following proposition runs so counter to traditional thinking about sovereign immunity that it invites dismissal as ridiculous, but I believe it is sound: *When the state deprives a person of his life, liberty, or property, and then invokes the doctrine of sovereign immunity to avoid any recourse against the state for that deprivation, the invocation of the immunity bar violates the due process clause of the fourteenth amendment.*

If the proposition just stated is correct, then the due process clause makes the creation of *some* form of tribunal to adjudicate civil claims against the state arising from deprivations of life, liberty or property constitutionally *mandatory*, and not a matter of legislative grace. To put the point more bluntly, if the proposition is correct, the Arkansas legislature would not have the constitutional power to do what it considered doing in the most recent legislative session—abolish the Claims Commission and put nothing in its stead, relegating claims against the state to the pre-1933 approach of seeking direct relief from the General Assembly through private legislation.

The proposition that sovereign immunity may, in its most extreme applications, be inconsistent with due process admittedly runs against centuries of tradition. But to borrow from the jurisprudence of Oliver Wendell Holmes, one of the sovereign immunity doctrine's classic defenders, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[32] Holmes taught that history must be part of the rational study of law, for it is only through the history of a rule's evolution that "you get the dragon out of his cave on to the plain and in the daylight,"[33] where "you can count his teeth and claws, and see just what his strength."[34] But to get the dragon out is only the first step. "The next is either to kill him, or to tame him and make him a useful animal."[35] And as Justice Traynor has written, "[t]he rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia."[36] The time has come for slaying the dragon.

In *Roesler v. Denton*,[37] the Arkansas Supreme Court addressed the relationship between sovereign immunity and due process with an analysis refreshingly emancipated from the shackles of habit, and well ahead of its time. After quoting the provision in Article 5, Section 20 of the Arkansas Constitution that renders the state immune from suit, the court declared that: "*Were it not for the administrative relief available to claimants such as appellants through the State Claims Commission, Article 5, Section 20 might well be considered to be violative of due process.*"[38] Recent developments in the due process jurisprudence of the United States Supreme Court reveal the prescience of this statement in *Roesler*.

No United States Supreme Court decision has ever held that sovereign immunity is inconsistent with the due process clause, but statements by the Court from a number of cases in the last seven years indicate that the Court may well be on the verge of such a pronouncement.[39]

As recently as 1979, the Court seemed unwilling to take the argument seriously. In *Feri v. Ackerman*,[40] the Court stated that "when state law creates a cause of action, the State is free to define defenses of immunity, unless, of course, the state rule is in conflict with federal law."[41] The potential loophole in *Feri*, of course, was its trailing clause: "unless . . .the state rule is in conflict with federal law." A year later, in *Martinez v. California*,[42] an attempt to exploit that loophole was made when the survivors of a fifteen year old girl who had been murdered by a parolee brought a section 1983 action against the state officials responsible for the parolee's release. California has enacted a statute making state officials absolutely immune from liability arising out of parole release decisions. The plaintiffs argued that the immunity statute violated the due process clause by depriving them of their cause of action. The court refused to accept this theory, but once again it used language that left the door open for future development:

> Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.[43]

In *Parratt v. Taylor*,[44] an inmate of a Nebraska state prison brought a section 1983 claim to recover the value of a hobby kit negligently lost by prison officials. The Court held that no due process violation existed, because the State of Nebraska had an established tort claims procedure pursuant to which the prisoner could be made whole. This post-deprivation remedy was adequate to satisfy the demands of the due process clause. The Court held that even if the Nebraska procedure might not provide all the relief available under a federal civil rights action (no right existed, for example, to trial by jury), no constitutional violation would exist as long as the state remedies at least provided for monetary compensation. The *negative implication* of *Parratt v. Taylor* was that if Nebraska had not provided any mechanism for redress of the prisoner's claim, a due process violation would have existed.

It should be noted parenthetically at this juncture that the Supreme Court very recently overruled part of *Parratt v. Taylor*, holding in *Daniels v. Williams*[45] and *Davidson v. Cannon*[46] that when a person is caused injury by mere negligent conduct on the part of state officials, no "deprivation" of life, liberty, or property exists to trigger the due process clause. At least for intentional deprivations of life, liberty, or property, however, *Parratt* remains good law, and by hypothesis the imposition of a sovereign immunity bar to liability for such intentional deprivations would violate due process.

Parratt was followed by *Logan v. Zimmerman Brush Company*.[47] *Logan* involved the dismissal of Lavern Logan from his position with the Zimmerman Brush Company, allegedly because of a physical handicap. An Illinois statute barred such employment discrimination, and established a Fair Employment Practices Commission to adjudicate complaints. Logan filed his claim with the Commission in a timely manner. Through an administrative oversight, however, the Commission inadvertently failed to conduct a hearing on his claim within the 120 day limitation period provided in the Illinois statute. The Illinois Supreme Court held that the limitation period was jurisdictional, and that the Commission was utterly without power to entertain Logan's claim, even though the termination of his claim was the fault of the Commissioner's neglect and beyond Logan's control. The Ilinois Supreme Court held that no due process violation was triggered by its ruling, because the Illinois legislature, in creating the discrimination law, could establish not only the right to seek redress for job discrimination, but also the procedures to be followed in pursuing that right, including an absolute 120 day jurisdiction limitation.

Before the United States Supreme Court, yet another argument was advanced to support the Illinois ruling. Logan, it was argued, was not denied due process because he could always sue the Illinois Commission for damages under the Illinois Court of Claims Act, for having negligently destroyed his "property"—his cause of action under the Illinois anti-discrimination statute.

The Supreme Court rejected all of these arguments, and held that the state of Illinois' treatment of Logan violated the due process clause. The state could not, the Court held, create a property interest and then turn around and permit the interest to be taken away without rhyme or reason. Quoting from a 1980 case, *Vitek v. Jones*,[48] the Court held that "[w]hile the legislature may elect not to confer a property interest. . .it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[49] Illinois, having initially created a claim for Logan, could not allow it to arbitrarily slip away

from Logan without procedural recourse. The Supreme Court then held that Illinois' position was not saved by the holding in *Parratt v. Taylor*, even if it were assumed that Logan could sue the Commission for damages before the Illinois Court of Claims. Such an argument, the Court held, "misses *Parratt's* point."[50] Unlike the *Parratt* case, the Court held, in Logan's case it was "the state system itself that destroys a complainant's property interests, *by operation of law*, whenever the Commission fails."[51] For "[u]nlike the complainant in *Parratt*, Logan [was] challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards."[52]

In *Hudson v. Palmer*,[53] the United States Supreme Court strongly suggested that the existence of a sovereign immunity bar to suit in the case of an intentional tort would violate the due process clause. The *Hudson* case involved a claim brought by a Virginia state prisoner, asserting that a prison official had intentionally destroyed certain noncontraband personal property in his cell. The Supreme Court held that the prisoner was not entitled to any relief in a federal civil rights action, because Virginia provided an adequate post-deprivation remedy for the alleged destruction of his property. In that section of the Court's opinion dealing with the adequacy of Virginia's remedies, the Court discussed the problem of sovereign immunity, and quite clearly intimated that the due process clause would indeed be violated if the state were to construe the prisoner's claim as barred by sovereign immunity.

In the critical passage, the Supreme Court noted that the prisoner maintained that "relief under applicable state law is far from certain and complete because a state court might hold that petitioner, as a state employee, is entitled to sovereign immunity."[54] It is critical to note that the Court did not dispute the *legal* significance of the prisoner's argument, but rather found his factual premise "unconvincing."[55] The Court carefully reviewed a number of lower federal and state court interpretations of Virginia law, and held that it was probable that a Virginia trial court would rule that no imunity bar existed. In light of this probability, the Court held, "the State has provided an adequate post-deprivation remedy for the alleged destruction of property."[56]

The latest developments in this doctrinal evolution are from *Daniels v. Williams*[57] and *Davidson v. Cannon*,[58] the cases in which the Court cut back significantly on the scope of due process claims by holding that the due process clause is not violated by deprivations of property caused by merely negligent conduct, thereby partially overruling *Parratt v. Taylor*. In a tantalizing footnote in *Daniels*, the Court stated that "[a]ccordingly, we need not decide whether, as petitioner contends, the possibility of a sovereign immunity defense in a Virginia tort suit would render that remedy 'unadequate' under *Parratt* and *Hudson v. Palmer*."[59] The footnote apparently means that the Supreme Court regards the question as open. But the logic of this whole developing line of precedent seems to push inexorably toward the conclusion that at least for those types of state-generated injuries that qualify as deprivations of life, liberty or property in the constitutional sense, sovereign immunity is inconsistent with the due process clause.[60]

Two Eighth Circuit cases involving the Arkansas Claims Commission support this hypothesis. In the first, *Steffen v. Housewright*,[61] an Arkansas inmate brought a federal civil rights action, alleging that certain items of his property valued at $882.70 were lost or stolen by state officials. The prisoner brought his claim before the State Claims Commission, and was awarded $200 on his claim. The Eighth Circuit affirmed the dismissal of the petitioner's subsequent federal suit, holding that the Arkansas Claims Commission remedy was adequate post-deprivation due process under *Parratt*.[62] As in *Parratt* itself, the negative implication of *Steffen* is that a due process clause violation *would* have existed if no claims procedure were available to the prisoner and sovereign immunity barred him from suit.

A second case, *Bumgarner v. Bloodworth*,[63] involved a claim that a Sheriff, a U.S. Treasury Department Agent, and an Arkansas State Trooper had seized and divided among themselves certain property during the course of a search of the plaintiff's house. The plaintiff sought return of the property, which included personal items of sentimental value. The district court dismissed the claim against the Arkansas defendants, on the theory that the plaintiff had an adequate post-deprivation remedy through recourse to the Arkansas Claims Commission, citing *Parratt v. Taylor*. The Eighth Circuit reversed, noting that the Claims Commission could not grant the plaintiff the relief he sought, that is, return of the specific property. More significantly, the court found the claims procedure remedy inadequate because "the Arkansas General Assembly must approve awards which exceed $2,000 and payment of such awards is conditional on appropriation of funds by the Legislature."[64]

In sum, despite one's first antagonistic reflex to the proposition that sovereign immunity is inconsistent with the due process clause, a reflex born of the habit of mind that perceives sovereign immunity as part of the natural legal order, a very

respectable argument may be made that such an inconsistency indeed exists. Two conditions must be satisfied to advance this argument successfully: (1) there must be a "deprivation" of life, liberty, or property by the state, which, after *Daniels* and *Davidson*, means something more than a negligently caused injury; and (2) there must be no adequate state post-deprivation remedy available.

These two conditions would seem to cut against the thesis of this article, however, rather than support it. Negligent deprivations, after *Daniels* and *Davidson*, apparently do not trigger any due process violation at all. And for intentional deprivations (or, should the Supreme Court so hold, for deprivations caused by a state of mind between negligence and intent, such as recklessness),[65] it may well be that the *absence* of a Claims Commission, and a reversion to the old private bills routine, would violate due process. But the state *does* have a Claims Commission, and if the Commission's existence is actually mandatory under the Constitution, what sense is there in suggesting its elimination?

To complete the thesis of this article it is necessary to advance the argument two steps further, by demonstrating first that the Claims Commission procedure is not *enough* due process, an argument essentially grounded in political philosophy, and second, that due process considerations aside, the Claims Commission approach is economically inefficient.

B. A Political/Philosophical Analysis

The distinction between legislative power and judicial power is central to American political philosophy, and as Professor L. Scott Stafford recently demonstrated in an excellent article, the distinction is central to the structure of Arkansas government.[66] The archetypes are well established: the essence of the judicial function is to resolve disputes by enforcing rights and duties as they stand on past facts pursuant to legal rules and principles supposed already to exist; the essence of the legislative function is to declare the law to be applied to future facts, bringing new rules and principles into existence.[67]

Now, lawyers and political scientists have long understood that the exigencies of governing a complex modern society inevitably dictate some blurring of the lines of demarcation separating the judicial, legislative, and executive functions of government. We no longer take seriously the notion that judges merely discover and apply law that preexists as some "brooding omnipresence"[68] in the sky; we rather frankly recognize that judges must "make law" as part of the natural function of judging, filling the interstices between the directives of positive law, and giving new life to old directives by flexibly applying the principles that underlie them. Sharp debates are held over how much law judges ought to make—Ed Bethune may prefer a different mix than Dale Bumpers—but the modern lawyer knows that some judicial legislation is inevitable; the issue is merely the degree. So too, the traditional simplicity of the ninth grade civics class lesson that government may be neatly divided into the three classic branches of government has given way to acceptance of a fourth branch, that vast array of quasi-legislative-executive-judicial agencies that form the infrastructure of the modern administrative state.[69]

The Arkansas Claims Commission partakes of shared functions in a manner typical of contemporary administrative agencies at both the federal and state levels. To the modern legal mind there is nothing *per se* offensive in a governmental body that combines to some degree legislative and judicial functions. And if our primary concern is that the Commission perform its judicial role judiciously, the Commission would seem to pass muster. The Commission is directed by statute to conduct its adjudications in a "judicial manner;"[70] it follows informal rules of procedure and evidence;[71] it looks by analogy much more like a court than a legislative body.

But as it is structured in Arkansas, the Commission's real identity is more legislative than judicial. The Commission lacks the single most important component of the judicial function—indeed, the single most important component in the very notion of a tribunal able to dispense meaningful due process of law in an adjudicatory setting: independence.

As far back as the Federalist Papers, Americans have recognized that due process is less often warped through the crude expediency of cash paid by litigants to judges under the table, as it is by more subtle pressures on judges from other branches of government. This is the driving force behind Alexander Hamilton's powerful *Federalist No. 78*,[72] and the genius of our judicial system. A just society does not want its judges making rulings by constantly looking over their shoulders to see how the legislative winds are blowing. Rather, we hold our judges to the ideal (admittedly never perfect in the real world) of deciding cases "objectively," on the evidence and through the reasoned evolution of precedent. The framers of both our federal and state governments openly feared that the judiciary might be tainted from too close an association with either the legislative or executive branch, and therefore built separation of functions

into our Constitutions. Separation of powers and due process of law are inextricably linked.

This is not to say that the legislature is incapable of acting in accordance with due process of law—of course, it has that capability; indeed, it has that constitutional duty. What it does mean is that due process means something different in a legislative setting than in a dispute resolution (or "judicial") setting. Legislatures are not institutionally competent to adjudicate. (In America, in fact, we generally empower our legislatures to "adjudicate" in only one circumstance: when sitting as triers of law and fact during the process of impeachment.) The Claims Commission, because it is grounded in the doctrine of sovereign immunity, and because it is dependent on later legislative approval of all but noncontroversial small claims, does not in the final analysis dispense due process at all; instead it dispenses legislative grace. An Arkansan injured by his or her own state has no real legal rights at all, no real guarantee of genuine due process, but only the opportunity to petition the legislature for mercy, dispensed by its agent, the Commission.

A contract breached by the State is every bit as breached as a contract breached by a private concern. A citizen run over and killed by a state truck is every bit as dead as a citizen killed by the truck of a private corporation. In a complex society, contracts will be broken, and injuries will occur; the law of contracts and the law of torts insure that the injuries incident to complex social life are paid for, normally by the person who breaks the contractual promise, or falls below the required duty of care. We are all encouraged to engage in socially productive activity, but when something goes wrong through our fault, we are all expected to pay the freight.

Why should the state be different? On what intelligent moral, political, or legal principle can the state justify breaching its contract with citizens and laughing in their faces? On what possible notion of justice can the state kill the family breadwinner and refuse to pay any recompense for the wrongful death?

Under our current regime, there is no apparent *legal* remedy for the most egregious breach of contract, or the most gruesome life-depriving act. There is a remedy of sorts, but it is not legal, in the sense that it is not grounded in any enforceable mechanism resembling what we would normally consider the "operation of law." The citizen may take his or her "claim" for breach of contract or wrongful death to the State Claims Commission. The Commission will set a date for the claim to be "adjudicated," and an advesarial hearing between the citizen's representative and the state's representative (from the Attorney General's office) will indeed take place, governed by somewhat relaxed but nonetheless concrete rules of evidence and procedure. But despite these admirable elements of orderly resolution at the Commission level, no candid characterization of this procedure would label it a legal remedy. For if the Commission abuses its power, if it ignores the evidence, contravenes its own procedural rules, or operates out of irrational whim or caprice, there is nothing that can be done about it, save petitioning the General Assembly. And from the opposite extreme, if the Commission allows the claim, and the legislature out of whim or caprice simply fails to abide by the Commission ruling and refuses to pay the claim, there is absolutely nothing the citizen can do. The appeal to the General Assembly is not worthless, of course. It does add something to the remedial structure, but what it adds is not what lawyers would call legal, but political. Water cannot rise higher than its source—the Commission exists at the will and pleasure of the legislature, and so do its rulings.

Once one accepts the basic axiom of sovereign immunity that "the king can do no wrong;" once one accepts, in short, the idea that the state, if it chooses, can leave itself totally immune from all liability for its civil wrongs, once one accepts rule by the grace and fiat of the sovereign as a substitute for the system of ordered liberty embodied in the elegant ideal of due process of law, then one will accept the Claims Commission, for it at least acts as a body mitigating the exercise of raw political power—half a due process loaf is arguably better than none.

Sovereign immunity, however, is embedded in a tyrannical tradition; due proces in a democratic tradition. In modern American life we have no kings, only politicians—kingpins, kingmen, kingfish. Sovereign immunity assumes that the king is above the law; due process assumes that the law is above the king. To accept sovereign immunity as an exception to the normal requirements of due process is to accept the reality that if the state damages an individual through some breach of normal societal rules of conduct (as formalized, for example, in tort or contract doctrines), the state may with unfettered freedom choose whether to pay for the damage at all, and if so, how much. The Claims Commission acts merely as the legislature's grace-dispensing agent, with its decisions as to how the state's precious largess should be distributed constantly subject to legislative countermand. If one unquestionably accepts sovereign immunity, one would necessarily accept the notion that the state could, if it chose, eliminate the Claims Commission altogether, relegating claimants to petitions for re-

lief in the form of bills introduced in the General Assembly.

Therein is the proof that the whole concept of sovereign immunity is antithetical to the principle of due process, and that a nonindependent Claims Commission analytically grounded in sovereign immunity is no less antithetical. For when stripped of its facade, the ultimate remedy in a state that adheres with tough-minded rigidity to a regime of sovereign immunity is nothing more than a petition for charity; the claimant must beg for political grace; relief is not governed by an pre-existing standard of precedent, evidence, or reason, but is rather a brutally political exercise—a simple matter of tallying yeas and nays.

C. An Economic Analysis

Due process and political philosophy are fine enough, but a skeptic will surely ask, "What's the bottom line? If the state were to waive sovereign immunity and consent to suit in her courts, would not the result be financially devastating?" There is little dispute about the fact that more money would be paid out by the state in judgments in court cases than under the current system. In an era of escalating insurance markets, the economic ramifications of waiving sovereign immunity are undeniably intimidating. Economic efficiency, however, is not one dimensional. The proper analysis is not limited to what it would cost the government to pay its legitimate debts, but what it costs society for government not to pay. Immunities, including the sorts of quasi-immunities created by the Claims Commission structure, cause inevitably a number of economic inefficiencies, and may in the end produce more "societal overhead" than they eliminate.

1. The Distinction Between Immunities and Defenses

The abrogation of sovereign immunity would not mean that the state would be liable for all harms caused by its activities. Although the state would be placed in a position essentially equivalent to a private entity as far as liability for breach of contract, the state would not be in a position equivalent to private entities with regard to liability in tort. For despite the fact that waivers of sovereign immunity typically recite that the government shall henceforth be held to the same rules of law as a private person or corporation, in actual practice the law of torts has distinguished between placing the state in the same litigation status as a private entity, and placing the state on a parity with a private entity with respect to all of its defenses.[73] A constitutional change providing that the state may be sued in her own courts would not mean that in applying the substantive law of torts, a state activity that would be tortious if engaged in by a private entity would always be tortious when engaged in by the state. Similarly, on the procedural side, it may be appropriate to exempt the state from jury trials, place caps on pain and suffering awards, limit or bar punitive damages, impose special exhaustion requirements, or make any number of special rules in suits against the state that have some rational basis in sound public policy.

The sovereign must be granted substantial latitude and flexibility in managing the complex affairs of government, and it will not do for the law of torts to presume to take over superintendence of government by arm chair quarterbacking every administrative judgment call that results in injury to determine if it meets the test of reasonableness. Lest the tort system swallow up the entire field of administrative law, exceptions to the substantive rules that would normally apply to private concerns must be interposed when the sovereign is the defendent.

No waiver of sovereign immunity is practicable without at least some basic exceptions tailored to the special circumstances of running a government—the Federal Torts Claims Act, for example, contains a long list of them—and if Arkansas were to abolish sovereign immunity, the matter of which types of exceptions to recognize would require careful and detailed study. For the purposes of this article the important point is to emphasize that as the specific details of waiver are worked out, special mitigating defenses may be built in to insure that the waiver does not portend financial disaster or mass disruption of governmental activity. The most fundamental exception would be the exception embodied in the aphorism that it is "not a tort for the government to govern." Courts trying tort suits are not permitted to review the discretionary judgments of governmental decisionmakers under the guise of applying the negligence standard. The usual deference to administrative expertise that is central to the fabric of administrative law is not summarily discarded when sovereign immunity is waived. This exception for discretionary functions may be either broadly or narrowly applied—in the federal system, for example, the exception has been construed quite expansively[74]—but that sort of fine-tuning is the type of matter that there would be time enough to resolve. The point is that acceptance of the general principle that waiver of sovereign immunity would be a just reform does not mean that no reasonable exceptions should be made in the application of substantive legal rules geared to the special problems attendant to the management of government.

2. Waiver of Immunity as a Risk-Spreading Device

Immunities are the exceptions, not the rule, in civil litigation; the normal presumption is that damages caused by a breach of contract are payed by the party who breached, not the innocent party, and that damages from tortious conduct are payed by the tortfeasor, not the victim. Most enterprises in society bear these charges as part of the unavoidable cost of doing business. In the law of torts particularly, the assignment of responsibility for injuries to the enterprises that cause them has been the dominant theme of the last two decades, as rules of immunity and other defenses have steadily erroded. One of the principle engines of this movement has been the notion that it is intrinsically fairer to spread the costs of injuries across a broad population base, rather than have major catastrophic losses borne by individual victims.[75] The most efficient way of absorbing the costs of injuries under this theory is to assign liability for them to the enterprise that caused them. The enterprise will then spread the costs of these injuries to all of its consumers—the cost of each product, for example, is incrementally increased to reflect either the costs of purchasing insurance or a contribution to a reserve out of which damages are paid. The enterprise is then under a powerful market incentive to seek cost efficient methods of reducing the injuries it causes. Against this backdrop immunity doctrines operate perversely; they reverse the process through which the tort system has sought to spread risks and create incentives for safety, by instead concentrating risks on victims, who are then relegated to what amounts to pleas for indulgence from the Claims Commission.

All citizens are the "consumers" of the services of government, and all citizens are simultaneously "stockholders." Immunity doctrines lower taxes, and to that extent benefit the citizen as stockholder. Immunity doctrines also operate to bar victims of state injury from *legally* enforceable rights to recompense, however, and in that sense they threaten the citizen as consumer. The just economic solution is for citizen-stockholders to bear small increases in the costs of running government so that the losses caused by government are not randomly and catastrophically born by individual citizen-consumers.

3. Misallocation Inefficiencies

Immunities are always a form of subsidy, shifting costs of doing business from injury causers to injury victims. Immunities are inefficient by definition: they artificially insulate the causers of injury from the charges they would otherwise bear as part of the cost of doing business for violating recognized norms of conduct. Economists tell us that it is socially efficient for entities to bear as much of the full social cost of their activities as possible. Subsidies create misallocations of social effort, and the inefficiency exists whether the government subsidizes private business or itself.[76]

4. The Economic Benefits of Legally Certain Benefits

The primary difference between recovery from the sovereign through the Claims Commission and subsequent appropriation by the General Assembly, and recovery through a judgment of a court enforceable through traditional legal process, is certainty. Litigation is far from an exact science, of course, whether the suit sounds in contract or tort. But at least the process itself is a relatively certain one; reasonably stable legal principles are applied through reasonably stable rules of procedure and evidence. The basic assumption of the judicial process is that if one manages to put forward satisfactory evidence of one's legal entitlement to recompense, the court will grant the remedy, without regard to any "political" factors. A claim for breach of contract or for violation of a duty recognized by tort law is a claim based on an enforceable right, while a request for payment from the legislature is to ask for the graceful intercession of a political body.

The biggest loser in the present system is big business. This is not a function of the law of torts or contracts, but the law of averages: large industrial and commercial enterprises have the most interaction with the state, and are the most likely to be victims of state-created injuries. It is no accident that most efforts to circumvent the sovereign immunity doctrine in Arkansas have been historically linked to major new state efforts at economic development, such as highway projects. Every business person knows that business thrives on certainty and stability in government; one of the factors inhibiting economic investment in many third world nations is the fear that no certain legal structure exists through which businesses can expect the just and orderly resolution of the injuries that inevitably will arise as a normal element of economic life. A government that wishes to encourage business to work as a partner in developing the economic infrastructure of the society does well to insure business that contract and tort claims will be honored through predictable legal processes, and not through the shifting exigencies of political clout. In the broad scheme of things, the sovereign immunity doctrine is only one small component of the overall legal climate in a state; but it nonetheless

cannot be ignored as part of the pattern of laws that make investment in the state either attractive or unattractive.

IV. Conclusion

The General Assembly should seriously consider undertaking a study to examine the feasibility of changing the constitutional structure so as to permit the state, with limitations, to be sued in her own courts. Very few Arkansans have ever thought much about the Claims Commission or the doctrine of sovereign immunity, and the suggestion that a constitutional amendment be adopted to alter the way in which the state pays claims is not exactly likely to capture the public imagination. Many will attack this suggestion for reform as just another ruse designed to line the pockets of lawyers; by permitting suits against the state in Arkansas courts more litigation business will exist, as attorneys who might well have been reluctant to accept a case before the Claims Commission will happily accept it in a more familiar forum with more lucrative potential.

Lawyers, however, would not be the only winners from this reform. The change would also be a victory for individuals who by happenstance have been injured by the state, for businesses that constantly interact with the state, and for the values of due process, political accountability, and economic efficiency, values that partake not of the pompous pontification that "the king can do no wrong," but rather of the populist precept: "every man a king."

FOOTNOTES

1. T. Aquinas, Summa Theologica, Q. 96, V Art., Reply Obj. 3 (1266-73) reprinted in G. Christie, Jurisprudence: Text and Readings on the Philosophy of Law 126-27 (1973).
2. Claims Agency Issue Brought to Conclusion, Ark. Gazette, March 23, 1985, at 15A, cols. 1-3.
3. Arkansas State Highway Comm'n v. Lasley, 239 Ark. 538, 540, 390 S.W.2d 443, 444 (1965).
4. *See* Ross, *State Immunity and the Arkansas Claims Commission*, 21 Ark. L. Rev. 180, 186 (1967). *See also* Eckert, *Another Decade of State Immunity to Suit—1937-1947*, 2 Ark. L. Rev. 375 (1948); Waterman, *One Hundred Years of a State's Immunity From Suit*, 2 Ark. L. Rev. 353 (1948).
5. The federal government waived its general tort immunity in 1946, with the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2402, 2671 *et seq.* (1946).
6. *See* W. Prosser, W. Keeton, P. Dobbs, R. Keeton, D. Owen, Prosser & Keeton on Torts, § 132 at 1044 (1984). To gain an interesting perspective on the evolution of state immunity issues, *see also* Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. Rev. 1363 (1954).
7. Ark. Const. of 1836, art. IV, § 22.
8. 1837 Ark. Acts, p. 742.
9. State v. Curren, 12 Ark. 321 (1851), *rev'd on other grounds*, 56 U.S. 304 (1853).
10. ARK. CONST., art. V, § 20.
11. ARK. CONST., art. XVI, § 2.
12. Ross, *supra* note 4, at 186.
13. *Id.*
14. *See* Stafford, *Separation of Powers and Arkansas Administrative Agencies: Distinguishing Judicial Power and Legislative Power*, 7 U.A.L.R. L. Rev. 279, 287 n.21 (1984).
15. Ross, *supra* note 4, at 187.
16. *Id.*
17. *See* Bumgarner v. Bloodworth, 738 F.2d 966, 968 (1984); Ark. State Claims Comm'n Rules & Regulations at 5; Stafford, *supra* note 14, at 291 n.38.
18. Ark. Acts 1985, No. 861, ARK. STAT. ANN. § 13-1401-2 (Supp. 1985).
19. *Id.*
20. *Id.*
21. 61 U.S. (20 How.) 527 (1857).
22. *Id.* at 529.
23. Numerous cases over the years have simply accepted the doctrine as a constitutional imperative to be accepted without question or comment. *See, e.g.*, Carter v. Bush, 283 Ark. 16, 677 S.W.2d 837 (1984); Boshears v. Arkansas Racing Commission, 258 Ark. 741, 528 S.W.2d 646 (1975); Hadin v. City of Devalls Bluff, 256 Ark. 480, 508 S.W.2d 559 (1974); Arkansas Game and Fish Commission v. Parker, 248 Ark. 526, 453 S.W.2d 30 (1970).
24. Ark. State Claims Comm'n Rules & Regulations at 3.
25. *See generally* Borchard, *Governmental Responsibility in Tort*, 36 Yale L.J. 1 (1926).
26. Ark. State Claims Comm'n Rules & Regulations at 3.
27. 205 U.S. 349 (1907)(Holmes, J.).
28. *Id.* at 352.
29. *Id.* at 353. The theme in *Polyblank* that no law exists except that which is created in positive rules established by the sovereign is central to much of Holmes' jurisprudential writings. *See, e.g.*, Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). The theme is similarly prominent in the thought of other legal thinkers of the "American Legal Realist" school. *See* Christie, *supra* note 1 at 640-44.
30. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan. L. Rev. 69, 71 (1982).
31. *See* Prosser & Keeton, *supra* note 6, § 131 at 1032-33.
32. Holmes, *supra* note 29, at 469.
33. *Id.*
34. *Id.*
35. *Id.*
36. Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 359 P.2d 457, 460, 11 Cal. Rptr. 89 (1961)(Traynor, J.).
37. 239 Ark. 462, 390 S.W.2d 98 (1965).
38. *Id.* at 463, 390 S.W.2d at 99 (emphasis added).
39. *See* Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company*, 1982 U. Ill. L. Rev. 831, 872-78.
40. 444 U.S. 193 (1979).
41. *Id.* at 198.
42. 444 U.S. 277 (1980).
43. *Id.* at 281-82.
44. 451 U.S. 527 (1981).
45. 106 S.Ct. 662 (1986).
46. 106 S.Ct. 668 (1986).
47. 455 U.S. 422 (1982).
48. 445 U.S. 480 (1980).
49. *Id.* at 490-91 n.6.
50. 455 U.S. at 435.
51. *Id.* at 436 (emphasis added).

52. *Id.*
53. 104 S.Ct. 3194 (1984).
54. *Id.* at 3205.
55. *Id.*
56. *Id.*
57. 106 S.Ct. 662 (1986).
58. 106 S.Ct. 668 (1986).
59. 106 S.Ct. 666, n.1.
60. *See* Smolla, *supra* note 39, at 872-78.
61. 665 F.2d 245 (8th Cir. 1981).
62. *Id.* at 248.
63. 738 F.2d 966 (8th Cir. 1984).
64. *Id.* at 968.
65. The Court in *Daniels* expressly left open the question of whether conduct such as recklessness or gross negligence could support a due process claim. 106 S.Ct. at 667.
66. *See generally* Stafford, *supra* note 14.
67. *See* Prentis v. Atlantic Coastline, 211 U.S. 210, 226(1908); Ozarks Electric Cooperative Corp. v. Turner, 277 Ark. 209, 211, 640 S.W.2d 438, 440 (1982); Stafford, *supra* note 14, at 279-83.
68. *See* Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945) (explaining how Erie R. Co. v. Thompkins, 304 U.S. 64 (1938), ended the period of thinking of law "as a 'brooding omnipresence' of Reason").
69. *See generally* Stafford, *supra* note 14.
70. ARK. STAT. ANN. § 13-1404 (1985 Supp.).
71. *Id.*
72. *See* The Federalist No. 78 (A. Hamilton).
73. For an excellent explication of this distinction, *see* Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409.
74. *See* Dalehite v. United States, 456 U.S. 15 (1953).
75. *See generally* G. Calabresi, The Cost of Accidents (1970).
76. I have made this point somewhat simplistically; the literature on the whole problem is rich. For discussion of many of the economic elements attendant to tort liability rules, *see, e.g.*, Michelman, *Pollution as a Tort: A Non-Accidential Perspective of Calabresi's Costs*, 80 Yale L. J. 647 (1971); Posner, *A Theory of Negligence*, 1 J. Leg. Stud. 29 (1972).