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Kentucky Law Journal

Volume 87 | Issue 2

Article 5

1998

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Recommended Citation

Hamm, Earl F. Jr. (1998) "The Reemergence of the Sovereign Immunity Doctrine in Kentucky," *Kentucky Law Journal*: Vol. 87 : Iss. 2 , Article 5.
Available at: <https://uknowledge.uky.edu/klj/vol87/iss2/5>

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NOTES

The Reemergence of the Sovereign Immunity Doctrine in Kentucky

BY EARL F. HAMM, JR.*

INTRODUCTION

Who said the king was dead? Only twelve years ago, the Kentucky Supreme Court left the age-old rule of sovereign immunity "that 'the King can do no wrong'"¹ weakened and limited in scope.² Since then, the Kentucky General Assembly and the courts have slowly reclaimed an expansive view of the sovereign immunity doctrine, including the Kentucky Supreme Court's recent four to three decision in *Withers v. University of Kentucky*³ to extend sovereign immunity to the University of Kentucky Medical Center.⁴

The right not to be sued is an enormous power. As one commentator points out, the privilege of sovereign immunity "confers upon the government an apparent advantage in the marketplace—unlike private individuals and entities, the government is liable only to the extent it deems

* J.D. expected 1999, University of Kentucky.

¹ Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530 (1992).

² See *Dunlap v. University of Ky. Student Health Serv. Clinic*, 716 S.W.2d 219 (Ky. 1986). The Kentucky General Assembly subsequently passed Kentucky Revised Statutes sections 44.072 and 44.073, which rendered the opinion moot on the issue of waiver of governmental immunity by the University by maintaining an insurance fund. See KY. REV. STAT. ANN. [hereinafter K.R.S.] §§ 44.072-.073 (Michie 1997). In a subsequent case, *Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1991), the court held that sovereign immunity had been waived without considering the 1986 amendments. See *id.* at 331.

³ *Withers v. University of Ky.*, 939 S.W.2d 340 (Ky. 1997).

⁴ See *id.* at 343.

appropriate.⁵ Generally, the Commonwealth of Kentucky cannot be sued for damages without its consent.⁶ The Kentucky Constitution places the power to waive sovereign immunity, at least partially, on the shoulders of the General Assembly.⁷

The debate, therefore, is not about whether the Commonwealth possesses immunity. It surely does. Instead, there are two sources of conflict. First, and more importantly, there is the question as to the breadth of sovereign immunity to which the state is entitled.⁸ In other words, to what extent are the state and its agents protected from liability? The second source of conflict is how much sovereign immunity the General Assembly has intended to waive.⁹ The resolution of the first conflict limits the solutions available to the second because the Commonwealth cannot waive a power it does not possess. Both concerns are sources of conflict at issue in the recent *Withers* opinion.¹⁰

In Kentucky, a person who sues the Commonwealth for negligence must do so before the Board of Claims.¹¹ The General Assembly estab-

⁵ Krent, *supra* note 1, at 1530.

⁶ *See id.* The state's immunity is not absolute. For example, the Commonwealth of Kentucky is bound by the Takings Clause of the United States Constitution, which prohibits "private property [to] be taken for public use, without just compensation." U.S. CONST. amend. V. Although the United States Supreme Court has not applied the Takings Clause to actions against the government under tort law, it has applied the Takings Clause to create damage remedies under breach of contract and loss of property theories. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that a state statute requiring a beachfront property owner to grant a public easement for beach users as a condition of securing a permit to rebuild a residence on the property is a taking for which the owner is entitled to just compensation); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a New York statute requiring owners of rental condominiums to permit the installation of cable television equipment on their property constitutes a compensable state "taking"); *see also* Krent, *supra* note 1, at 1575-78 nn.186-196.

⁷ *See* KY. CONST. § 231. Section 231 provides that "[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." *Id.*

⁸ *See* *Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 331 (Ky. 1991).

⁹ *See Withers*, 939 S.W.2d at 345.

¹⁰ *See id.* at 342.

¹¹ *See* K.R.S. § 44.072 (Michie 1997). Section 44.072 provides:

It is the intention of the General Assembly to provide the means to enable a person negligently injured by the Commonwealth, any of its cabinets,

lished the Board of Claims as “a limited waiver of sovereign immunity.”¹² The Board of Claims maintains direction over any suits that might arise against the state, but reflects the legislature’s intent to partially waive the Commonwealth’s sovereign immunity defense in limited circumstances.¹³ The Board of Claims limits the jurisdiction, amount of damages, and the scope of activity by the state or its agents that could produce liability.¹⁴ At issue in *Withers* were the 1986 amendments to the Board of Claims Act,¹⁵ which protected state entities that had purchased insurance or created self-

departments, bureaus or agencies, or any of its officers, agents or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies to be able to assert their just claims as herein provided. The Commonwealth thereby waives the sovereign immunity defense only in the limited situations as herein set forth. It is further the intention of the General Assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth . . . in all other situations except where sovereign immunity is specifically and expressly waived as set forth by statute. The Board of Claims shall have exclusive jurisdiction to hear claims for damages

Id.

¹² *Gray v. Commonwealth, Transp. Cabinet, Dep’t of Highways*, 973 S.W.2d 61, 64 (Ky. App. 1997).

¹³ See K.R.S. § 44.070(1). Section 44.070(1) provides:

A Board of Claims . . . is created and vested with full power and authority to investigate, hear proof, and to compensate persons for damages sustained to either person or property as a proximate result of negligence on the part of the Commonwealth, any of its cabinets, departments, bureaus, or agencies, or any of its officers, agents, or employees while acting within the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus, or agencies; . . . [except] damages for mental distress or pain or suffering, and compensation shall not be allowed, awarded, or paid for said claims for damages.

Id.

¹⁴ See *id.*

¹⁵ See *id.* The specific amendment at issue in *Withers* was section 44.073(14), which states in pertinent part:

The filing of an action in court or any other forum or the purchase of liability insurance or the establishment of a fund for self-insurance by the Commonwealth, its cabinets, departments, bureaus, or agencies or its agents, officers, or employees thereof for a government related purpose or duty shall not be construed as a waiver of sovereign immunity or any other immunity or privilege thereby held.

Id. § 44.073(14).

insurance pools. These acts had previously constituted a waiver of their sovereign immunity defense.¹⁶ *Withers* upheld the amendments, entitling the University of Kentucky Medical Center ("UKMC") to the sovereign immunity defense although it had contributed to a medical malpractice compensation fund.¹⁷

The recent *Withers* decision is significant because it restricted the waiver of sovereign immunity for a profitable arm of the state. *Withers* also extended the sovereign immunity defense to an entity that both competes with other private hospitals and had previously been exposed to liability in negligence suits.¹⁸ Moreover, the close margin of the decision suggests that the scope of the sovereign immunity doctrine is still in question in Kentucky. This Note will examine the breadth and propriety of Kentucky's sovereign immunity doctrine in tort actions involving the Commonwealth. Part I will discuss the legal issues and procedural history of the decision in *Withers v. University of Kentucky*.¹⁹ Part I will also address the line of precedents and statutes upon which the court based its opinion and how the decision affects the current application of waiver to claims against the Commonwealth.²⁰

Part II argues that there is a constitutional challenge to the sovereign immunity doctrine in Kentucky as applied by the 1986 amendments to the Board of Claims Act.²¹ Kentucky courts have consistently applied sections 14, 54, and 241 of the Kentucky Constitution²² as a guarantee of "jural rights" to those seeking claims under the common law.²³ The jural rights doctrine limits the ability of the Commonwealth to employ sovereign immunity as a defense. Recent decisions after *Withers* reaffirm both the sovereign immunity and jural rights doctrines but do not resolve the inherent conflict between them.²⁴

¹⁶ See *Withers v. University of Ky.*, 939 S.W.2d 340, 344 (Ky. 1997); see also *Dunlap v. University of Ky. Student Health Serv. Clinic*, 716 S.W.2d 219, 220 (Ky. 1986).

¹⁷ See *Withers*, 939 S.W.2d at 345.

¹⁸ See *Dunlap*, 716 S.W.2d at 220.

¹⁹ *Withers v. University of Ky.*, 939 S.W.2d 340 (Ky. 1997).

²⁰ See *infra* notes 26-93 and accompanying text.

²¹ See *infra* notes 94-164 and accompanying text.

²² KY. CONST. §§ 14, 54, 241.

²³ See *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991); *McCullum v. Sisters of Charity*, 799 S.W.2d 15 (Ky. 1990); *Gould v. O'Bannon*, 770 S.W.2d 220 (Ky. 1989).

²⁴ See *infra* notes 115-64 and accompanying text.

Finally, this Note will conclude that the General Assembly is not the only branch of government that should determine the scope of the sovereign immunity doctrine. To vest that determination in one branch would be to ignore Kentucky's constitutional tensions between jural rights and the sovereign immunity doctrine. Generally, the General Assembly is the optimal branch to decide when to grant waivers of sovereign immunity. This authority, however, must be balanced with the constitutional rights of those injured by negligent acts of the Commonwealth. Although the judiciary's construction of waiver of the sovereign immunity defense in tort actions against the Commonwealth has sometimes resulted in inconsistent opinions,²⁵ it protects Kentucky citizens from unfair or unsavory results without inhibiting Kentucky's political processes or the effective functioning of government.

I. *WITHERS V. UNIVERSITY OF KENTUCKY*

A. *The Court's Decision*

In *Withers*, the estate of Emilie M. Withers filed a claim for wrongful death against the University of Kentucky and the physicians that administered treatment to Ms. Withers, alleging medical negligence.²⁶ Ms. Withers allegedly died as the result of a misdiagnosis and a subsequent negligent prescription of medications.²⁷ Ms. Withers began her treatment at the UKMC and remained in the care of a treating doctor in training, who was under the supervision of two other physicians, until she died exactly one month after her first visit.²⁸

Although the estate of Ms. Withers alleged that the prescription of the medication was negligent, the trial court did not determine "the involvement of the treating physician, the pharmacist, the immediate supervisors of the physician, the Medical Center itself and finally, the University."²⁹ Before the merits of the case were addressed, the University of Kentucky, separate from the individual physicians, moved to dismiss the case on the basis of sovereign immunity.³⁰ The trial court granted the University's motion to dismiss and denied the motion by Ms. Withers's estate to set

²⁵ See *Withers v. University of Ky.*, 939 S.W.2d 340, 343-44 (Ky. 1997).

²⁶ See *id.* at 342.

²⁷ See *id.* at 347 (Wintersheimer, J., dissenting).

²⁸ See *id.* (Wintersheimer, J., dissenting).

²⁹ *Id.* (Wintersheimer, J., dissenting).

³⁰ See *id.* at 342.

aside the order of dismissal.³¹ The court of appeals affirmed the dismissal.³² As the Kentucky Supreme Court later pointed out, the “claims [against the individual physicians] were unaffected by the dismissal of the University of Kentucky.”³³

The Kentucky Supreme Court granted a discretionary review of the case and affirmed the court of appeals in a four to three decision.³⁴ The court framed its decision in *Withers* around two interrelated issues: whether the University of Kentucky was entitled to the protection of sovereign immunity and, if so, whether the General Assembly had waived that immunity by statute.³⁵ The court held that the University of Kentucky was entitled to immunity from claims of medical negligence at its medical center.³⁶ The court further held that statutes authorizing the UKMC to share in a malpractice insurance fund were not a waiver of sovereign immunity by the General Assembly.³⁷

B. *The Berns Test*

Both the majority and dissenting opinions in *Withers* hinged on the UKMC's status as a central part of the state. Three of the justices in the majority concluded easily that the University of Kentucky was an arm of the state entitled to sovereign immunity.³⁸ More controversially, the court further held that the UKMC was therefore a central part of the state, observing that “this Court has no right to merely refuse to apply [sovereign immunity] or abrogate the legal doctrine” with respect to the medical center.³⁹ The three justices in dissent countered that “the University and the Medical Center . . . are so independent from Central State Government that they cannot claim the protection of sovereign immunity.”⁴⁰

³¹ *See id.*

³² *See id.*

³³ *Id.* at 342 n.1. The court asserted that sovereign immunity for the state did not reach its agents, servants, and employees. *See id.*; *see also* *Gould v. O'Bannon*, 770 S.W.2d 220 (Ky. 1989); *Happy v. Erwin*, 330 S.W.2d 412 (Ky. 1959).

³⁴ *See Withers*, 939 S.W.2d at 340.

³⁵ *See id.* at 343.

³⁶ *See id.* at 346.

³⁷ *See id.*

³⁸ *See id.* at 343.

³⁹ *Id.* at 344. The majority opinion consisted of Justices Cooper, Johnstone, and Lambert. Chief Justice Stephens filed a separate concurring opinion. *See id.* at 346.

⁴⁰ *Id.* at 349 (Wintersheimer, J., dissenting). Justices Graves and Stumbo joined in Justice Wintersheimer's dissent. *See id.* at 346.

The court's decision did not overrule the determinative case law for the application of sovereign immunity. Instead, the court fit its holding within the rubric of *Kentucky Center for the Arts Corp. v. Berns*.⁴¹ In *Berns*, the court utilized a test first recognized in *Gnau v. Louisville & Jefferson Co. Metropolitan Sewer District*⁴² for determining whether an entity is entitled to sovereign immunity. The *Berns* court explained the test as follows: "This is a two-pronged test, the first consisting of the 'direction and control of the central State government,' and the second consisting of being 'supported by monies which are disbursed by authority of the Commissioner of Finance out of the State treasury.'"⁴³

The *Withers* majority asserted that "[t]he judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it."⁴⁴ Certainly, this assertion is not in dispute. The majority used this as a constitutional leg to stand on, concluding that "[t]he determination of whether an entity is entitled to protection by the constitutional principle of sovereign immunity is for the judiciary."⁴⁵ Next, the *Withers* court applied the *Berns* test and concluded that the University of Kentucky met the requirements of *Berns* "unmistakably [because] the University of Kentucky operates under the direction and control of central state government and . . . is funded from the State Treasury."⁴⁶

The *Berns* court applied the two-pronged test to a set of facts similar to those in *Withers*.⁴⁷ In *Berns*, Mr. Berns was injured when he fell down a set of steps in front of the Kentucky Center for the Arts after a handrail allegedly came loose as he was holding it to maintain his balance.⁴⁸ The rationale for the *Berns* test is easy to follow. In situations in which the state undertakes a typically governmental function with significant supervision or control from the state government and acts or fails to act reasonably, sovereign immunity applies.⁴⁹ If the government entity acts

⁴¹ *Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1991).

⁴² *Gnau v. Louisville & Jefferson Co. Metro. Sewer Dist.*, 346 S.W.2d 754 (Ky. 1961).

⁴³ *Berns*, 801 S.W.2d at 331 (quoting *Gnau*, 346 S.W.2d at 755).

⁴⁴ *Withers*, 939 S.W.2d at 342 (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989)).

⁴⁵ *Id.*

⁴⁶ *Id.* at 343.

⁴⁷ *See Berns*, 801 S.W.2d at 328.

⁴⁸ *See id.*

⁴⁹ *See id.* at 331.

somewhat independently, such as having its own board of governors and no supervision from the state, then sovereign immunity would not apply.⁵⁰ The *Berns* court held that the Kentucky Center for the Arts was not entitled to sovereign immunity because it performed “substantially the same functions as any private business engaged in the entertainment business.”⁵¹

The opinion in *Withers*, written by Justice Lambert who concurred with the opinion in *Berns*, conceded that the *Berns* decision makes “a distinction between a governmental function and a proprietary function performed by an entity having governmental roots.”⁵² In addition, Justice Lambert acknowledged the precedent of a turn-of-the-century case, *Gross v. Kentucky Board of Managers*,⁵³ that held that “not every corporation created by the state is entitled to sovereign immunity.”⁵⁴ To these arguments, Justice Lambert distinguished the facts of *Withers*.⁵⁵ He observed that operating a hospital is an integral part of a medical school’s governmental function and reasoned that the “teaching and research function” of a public medical school is to provide the education and training requisite to acquire accreditation.⁵⁶ The UKMC met the requirements of the *Berns* test and, thus, secured the sovereign immunity defense subject to any subsequent waiver.⁵⁷

The most significant result of Justice Lambert’s opinion is that the *Berns* test remains valid law. To its credit, the *Withers* court acknowledged that Kentucky’s appellate courts had produced inconsistent rules of law concerning sovereign immunity.⁵⁸ The essence of the court’s decision was not to amend the language of the *Berns* test, but to extend the applicability of the language to more state entities. In either instance, the net effect would have been the same, but by retaining the *Berns* language, the *Withers* court was able to stabilize the rule of law and enact a broad policy change without much linguistic struggle.

⁵⁰ *See id.*

⁵¹ *Id.*

⁵² *Withers v. University of Ky.*, 939 S.W.2d 340, 343 (Ky. 1997).

⁵³ *Gross v. Kentucky Bd. of Managers*, 49 S.W. 458 (Ky. 1899).

⁵⁴ *Withers*, 939 S.W.2d at 343 (citing *Gross*, 49 S.W. at 459).

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.* at 343-44 (“Upon our determination that University of Kentucky is entitled to sovereign immunity, we must next consider whether or in what manner there has been a legislative waiver of immunity.”).

⁵⁸ *See id.* at 344.

C. *The Issue of Waiver*

In both *Berns* and *Withers*, the Kentucky Supreme Court sought to determine two issues: first, whether the state entity was entitled to sovereign immunity, and second, whether the purchase of liability insurance waived immunity.⁵⁹ The *Berns* court never addressed the issue of waiver because it found the Kentucky Center for the Arts to be outside the scope of the sovereign immunity doctrine.⁶⁰ Put another way, the Center for the Arts had no immunity to waive. Therefore, the *Berns* court did not consider the effect of the 1986 amendments to the Board of Claims Act.⁶¹

The *Withers* court stated that “the granting of waiver is a matter exclusively legislative.”⁶² This rule is consistent with a line of cases that defer the determination of waiver to the legislature.⁶³ Specifically, in *Dunlap v. University of Kentucky Student Health Services Clinic*,⁶⁴ the court interpreted an enabling statute that authorized a malpractice compensation self-insurance fund to be a partial waiver of sovereign immunity.⁶⁵ The *Dunlap* court examined the language of Kentucky Revised Statutes section 164.939, which “authoriz[ed] the University of Kentucky to establish from its own funds other than general tax revenues a basic coverage compensation fund to assure itself that health care malpractice claims or judgments against itself, or its agencies will be satisfied.”⁶⁶ The

⁵⁹ See *id.* at 342; *Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 328 (Ky. 1991).

⁶⁰ See *Berns*, 801 S.W.2d at 332.

⁶¹ See *id.*

⁶² *Withers*, 939 S.W.2d at 344.

⁶³ See *Kestler v. Transit Auth.*, 758 S.W.2d 38, 40 (Ky. 1988) (holding that a statute requiring the transit authority to maintain insurance was a partial waiver of immunity). The *Kestler* court held that the doctrine of sovereign immunity is “deeply planted in the law of the Commonwealth through Section 231 of the Kentucky Constitution.” *Id.* at 39; see also *Dunlap v. University of Ky. Student Health Serv. Clinic*, 716 S.W.2d 219 (Ky. 1986) (holding that when a statute provides a hospital with an insurance fund, sovereign immunity is partially waived); *Taylor v. Knox County Bd. of Educ.*, 167 S.W.2d 700 (Ky. 1942) (holding that when a statute allows a school board to set aside funds to provide for insurance against negligent bus drivers, sovereign immunity is partially waived).

⁶⁴ *Dunlap v. University of Ky. Student Health Serv. Clinic*, 716 S.W.2d 219 (Ky. 1986).

⁶⁵ See *id.* at 222.

⁶⁶ *Id.* at 220 (quoting K.R.S. § 164.939) (emphasis omitted).

Dunlap court determined that “[f]rom the words of this statute, legislative waiver is plain in its meaning and intent.”⁶⁷

Logically, the court’s holding in *Dunlap* makes sense. If a state entity was not expecting a lawsuit, it would not protect itself by investing its own funds in accounts specifically designated for liability payments. A prudent state entity expecting a lawsuit would buy insurance. Moreover, accumulating taxpayer dollars in self-insurance pools when, in fact, the agency was immune to suit would be a wasteful allocation of public resources. Nevertheless, the General Assembly’s adoption of the amendments to the Board of Claims Act in 1986 effectively overruled *Dunlap* by requiring an express waiver in order to forfeit immunity.⁶⁸ Therefore, the *Withers* decision simply created new law from an interpretation of “new” statutes, rather than modifying or overruling past law. The 1986 amendments created an avenue for the court to uphold the extension of sovereign immunity to governmental purchasers of liability insurance. The amendments, combined with the broader interpretation of the *Berns* test, allowed the *Withers* court to stretch the acknowledgment of the sovereign immunity of the University of Kentucky⁶⁹ to the corporate entities within the University of Kentucky that insured themselves against negligence claims.⁷⁰

D. *The Dissenting Opinion*

The three dissenting justices in *Withers* agreed with the majority that the *Berns* test was applicable but argued that the majority misapplied the standard.⁷¹ Justice Wintersheimer, the author of the *Withers* dissent,

⁶⁷ *Id.*

⁶⁸ See *supra* notes 2, 21 and accompanying text. This is also true of counties, which are entities of the state but are not included in the Board of Claims Acts. In *Franklin County v. Malone*, 957 S.W.2d 195 (Ky. 1997), the Kentucky Supreme Court held that neither a statute authorizing a county to buy insurance for its employees nor the county’s participation in a self-insurance fund acts as a waiver of the county’s sovereign immunity. See *id.* at 203-04.

⁶⁹ See *Frederick v. University of Ky. Med. Ctr.*, 596 S.W.2d 30, 31 (Ky. App. 1979) (expressly recognizing the immune status of the University of Kentucky), overruled by *Dunlap v. University of Ky. Student Health Serv. Clinic*, 716 S.W.2d 219 (Ky. 1986). As stated above, the *Dunlap* decision was rendered moot as far as it stated that the creation of a liability self-insurance fund constituted a waiver of sovereign immunity. See *supra* notes 64-67 and accompanying text.

⁷⁰ See *Withers v. University of Ky.*, 939 S.W.2d 340, 345 (Ky. 1997).

⁷¹ See *id.* at 347 (Wintersheimer, J., dissenting). Justice Wintersheimer was joined in his dissent by Justices Graves and Stumbo. See *id.* at 346.

reasoned that “there are two classes of powers inherent in the nature of government.”⁷² The dissent classified these powers as governmental and proprietary.⁷³ Naturally, an entity of the government that exercised primarily governmental functions would be entitled to sovereign immunity.⁷⁴ An entity engaged in functions that are primarily carried out by the private sector, however, would not be so entitled.⁷⁵ The dissent argued that rather than endorsing a blanket rule of sovereign immunity, each situation in which a governmental entity fails to act reasonably or acts negligently should be evaluated on a case-by-case basis as to whether sovereign immunity exists.⁷⁶

The dissent argued correctly that a case-by-case analysis by the judiciary is appropriate,⁷⁷ but it failed to acknowledge the proper deference that should be given to the General Assembly. After all, the legislature is still the constitutional grantor of sovereign immunity and waiver.⁷⁸ Essentially, the dissent endorsed a balancing test, such as the *Berns* test. Justice Wintersheimer, however, offered that “[t]he majority opinion in [*Withers*] breaks entirely new ground based on a misunderstanding of the legislative response to *Dunlap* and in effect overrules *Berns* as well as a number of other cases, both old and new.”⁷⁹ In sum, Justice Wintersheimer agreed with the majority in utilizing the *Berns* test as a balancing approach in determining the UKMC’s eligibility for the sovereign immunity defense, but he concluded that by wrongly determining the UKMC to be eligible, the majority had given a whole new meaning to the test.⁸⁰

E. *The Chief Justice’s Concurrence*

The brief concurrence of former Chief Justice Stephens⁸¹ in *Withers* constituted the fourth vote to affirm the decision of the court of appeals.

⁷² *Id.* at 348 (Wintersheimer, J., dissenting).

⁷³ *See id.* (Wintersheimer, J., dissenting).

⁷⁴ *See id.* (Wintersheimer, J., dissenting).

⁷⁵ *See id.* at 347 (Wintersheimer, J., dissenting) (citing *Calvert Inv., Inc. v. Louisville & Jefferson Co. Metro. Sewer Dist.*, 805 S.W.2d 133 (Ky. 1991), which held that governmental agencies performing services similar to private counterparts should be held liable for negligent actions).

⁷⁶ *See id.* at 348 (Wintersheimer, J., dissenting).

⁷⁷ *See id.* (Wintersheimer, J., dissenting).

⁷⁸ *See* KY. CONST. § 231.

⁷⁹ *Withers*, 939 S.W.2d. at 352 (Wintersheimer, J., dissenting).

⁸⁰ *See id.* (Wintersheimer, J., dissenting).

⁸¹ *See* Justice Stephens was replaced as Chief Justice by Justice Lambert on October 5, 1998. *Hail to New Chief: Lambert Sworn as Leader of Kentucky Supreme Court*, LEXINGTON HERALD-LEADER, Oct. 6, 1998, at B1.

Significantly, Chief Justice Stephens argued that the *Berns* test should not even be used.⁸² The divisive issue between the majority opinion and the concurrence was which arm of the government should decide when sovereign immunity should be granted. Chief Justice Stephens stated that in *Berns*, the court “went too far and usurped a function squarely within the discretion of the legislature.”⁸³ Chief Justice Stephens advocated the return to greater deference to the General Assembly.⁸⁴ The three justices in the majority, however, must have been unwilling to cede this power to the legislature given that they chose to adopt the *Berns* test.⁸⁵ Consistent with the case law of the last half century, both the majority and the dissent were more comfortable keeping the ultimate discretion to make decisions about sovereign immunity within the judicial branch.⁸⁶

Although the Chief Justice’s concurrence tipped the balance of the court to favor sovereign immunity for the UKMC, the Chief Justice agreed with neither the majority nor the dissent regarding their considerations of the sovereign immunity doctrine.⁸⁷ Chief Justice Stephens relied on the original intent of the drafters of the constitution.⁸⁸ Considering the language of section 231 of the Kentucky Constitution, which states that “[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth,”⁸⁹ Chief Justice Stephens suggested that judicial constructions such as the *Berns* test do not “comport with the purpose the original drafters of our constitution had in mind.”⁹⁰

Chief Justice Stephens’s opinion contrasts squarely with the *Berns* court. The *Berns* court stated:

The only positive conclusion one can draw from the various cases is that the appropriate line separating persons and entities entitled to claim inclusion in the Commonwealth’s sovereign immunity is not a line which

⁸² See *Withers*, 939 S.W.2d at 346–47 (Stephens, C.J., concurring).

⁸³ *Id.* at 346 (Stephens, C.J., concurring).

⁸⁴ See *id.* at 347 (Stephens, C.J., concurring).

⁸⁵ See *id.* at 342.

⁸⁶ See *id.* at 342, 347. The test that would later become known as the *Berns* test was first recognized in *Gnau v. Louisville & Jefferson Co. Metro. Sewer Dist.*, 346 S.W.2d 754 (Ky. 1961). See *Withers*, 939 S.W.2d at 342; *supra* notes 41–43 and accompanying text.

⁸⁷ See *Withers*, 939 S.W.2d at 346–47 (Stephens, C.J., concurring).

⁸⁸ See *id.* at 347 (Stephens, C.J., concurring).

⁸⁹ KY. CONST. § 231.

⁹⁰ *Withers*, 939 S.W.2d at 347 (Stephens, C.J., concurring).

the General Assembly may draw in its discretion, but a problem of constitutional law which our Court must address on a case by case basis.⁹¹

Because the increasing number of endeavors that the state undertakes “opens it to the possibility of negligent conduct which must be compensated in a reasonable fashion,”⁹² allowing the General Assembly to adjust the coverage of the doctrine of sovereign immunity is “an alternative to private, special legislation” for every negligence suit against the Commonwealth.⁹³ The increasing expanse of governmental and proprietary functions of the state requires an active, not passive, judiciary to determine eligibility for sovereign immunity.

II. CONSTITUTIONAL LIMITATIONS ON GOVERNMENTAL IMMUNITY

A. Introduction

The constitution authorizes the General Assembly to create certain causes of action and standards of evidence. The jural rights doctrine protects causes of action that preexisted the 1891 constitution, such as common law negligence or gross negligence. Kentucky courts created, recognized, and instructed juries according to standards of care prior to ratification. The jural rights doctrine preserves these causes of action and standards. The doctrine itself is quite controversial. To proponents, it spares the courts from starting anew because it leaves intact an extensive body of common law. To opponents, it is an indirect usurpation of legislative powers by the judiciary.

Taken literally, the reading of sections 14, 54, 231, and 241 of the Kentucky Constitution *should* cause some confusion. Sections 14, 54, and 241 grant recovery rights to plaintiffs,⁹⁴ and section 231 limits the liability of the state as a defendant.⁹⁵ Since the adoption of the current constitution in 1891, Kentucky courts have sprinkled the original intent behind the constitutional language with judicial interpretations of emerging issues to produce a montage of law that is neither completely textually based nor entirely judicially constructed. Part of the confusion stems from the

⁹¹ Kentucky Ctr. for the Arts Corp. v. Berns, 801 S.W.2d 327, 329 (Ky. 1990).

⁹² *Withers*, 939 S.W.2d at 348 (Wintersheimer, J., dissenting).

⁹³ *Berns*, 801 S.W.2d at 329.

⁹⁴ See KY. CONST. §§ 14, 54, 241.

⁹⁵ See *id.* § 231.

apparent conflict between the sovereign immunity and jural rights doctrines.

B. Constitutional Basis of the Jural Rights Doctrine

The bases for the jural rights doctrine are provided in sections 14, 54, and 241 of the Kentucky Constitution.⁹⁶ Section 14 of the Kentucky Constitution provides: “All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”⁹⁷ Section 54 of the Kentucky Constitution reads: “The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.”⁹⁸ Section 241 of the Kentucky Constitution states:

Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.⁹⁹

Taken together, these sections form the cornerstone of what Kentucky courts have interpreted as jural rights that protect common law tort actions.¹⁰⁰ Section 14 is part of the bill of rights in Kentucky’s first constitution of 1792.¹⁰¹ Sections 54 and 241 were added in the fourth (and

⁹⁶ See *id.* §§ 14, 54, 241.

⁹⁷ *Id.* § 14.

⁹⁸ *Id.* § 54.

⁹⁹ *Id.* § 241.

¹⁰⁰ I will continue to refer to sections 14, 54, and 241 as the jural rights doctrine, as does Professor Lewis, but as he points out, “the court frequently refers to the sections in combination as the ‘open courts’ provisions of the constitution.” Thomas P. Lewis, *Jural Rights Under Kentucky’s Constitution: Realities Grounded in Myth*, 80 KY. L.J. 953, 954 (1992) (citation omitted). Incidentally, although I disagree with Professor Lewis’s ultimate conclusion about the appropriate reading of the jural rights doctrine, my disagreement should not be viewed as a criticism of his outstanding teaching and scholarship.

¹⁰¹ See *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 811 (Ky. 1991).

current) constitution of 1891.¹⁰² These sections were read together in 1932 by the Kentucky Court of Appeals in *Ludwig v. Johnson*.¹⁰³ The *Ludwig* court examined the status of common law claims at the time of the 1891 ratification.¹⁰⁴ It found that among citizens who were injured, each victim possessed extensive rights to appear before a court and seek recovery from the tortfeasor.¹⁰⁵ Specifically, the court held that section 54 could only be read with the other two:

When . . . section [54] is read in connection with other sections of the same instrument, such as sections 14 and 241 [establishing right to recover for wrongful death], the conclusion is inescapable that the intention of the framers of the Constitution was to inhibit the Legislature from abolishing rights of action for damages for death or injuries caused by negligence.¹⁰⁶

Arguably, the *Ludwig* court construed the language of each section to be intertwined with the others, as defined by the common law rights of section 233.¹⁰⁷ A subsequent decision interpreted section 14 “to preserve those jural rights which had become well established prior to the adoption of the Constitution.”¹⁰⁸

The other element of the jural rights doctrine is found in section 241.¹⁰⁹ It provides that damages may be recovered for the death of a person caused by a negligent act or omission.¹¹⁰ Section 241 does not provide an exception based on the identity of the tortfeasor, whether individual, corporate, or governmental.¹¹¹ Prior to the *Withers* interpretation of the Board of Claims amendments, Kentucky law required a case-by-case

¹⁰² *See id.*

¹⁰³ *Ludwig v. Johnson*, 49 S.W.2d 347 (Ky. 1932).

¹⁰⁴ The court stated that “[n]o exception is made to the provision that every person for any injury done him in his person shall have remedy by due course of law.” *Id.* at 350.

¹⁰⁵ *See id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See* KY. CONST. § 233 (adopting the general and natural laws of Virginia in 1792 as the common law of Kentucky).

¹⁰⁸ *Happy v. Erwin*, 330 S.W.2d 412, 413-14 (Ky. 1959); *see also* *Kentucky Utilities Co. v. Jackson County Rural Elec. Coop. Corp.*, 438 S.W.2d 788, 790 (Ky. 1968).

¹⁰⁹ KY. CONST. § 241.

¹¹⁰ *See id.*

¹¹¹ *See id.*

analysis of whether a particular agency was entitled to immunity for its acts.¹¹² If jural rights are, in fact, common law rights, the General Assembly would have infringed upon these rights by providing immunity for *all* government agencies without regard to their function.

C. *Judicial Affirmation of Jural Rights*

In *Withers*, the estate of Ms. Withers failed to give notice to the attorney general that it was challenging the constitutionality of a statute and thus failed to preserve the constitutional argument of the jural rights doctrine against the Board of Claims amendments.¹¹³ Therefore, the *Withers* court did not consider the constitutional validity of the jural rights doctrine against the amendments to the Board of Claims Act. The lack of formal constitutional challenge did not stop the court from prognosticating, as it added in dictum that the "appellants' constitutional claims would appear to be insubstantial."¹¹⁴ Although this language is nonbinding, it is certainly a strong indicator of decisions regarding the sovereign immunity doctrine in the near future by this particular court.

Most recently, the court affirmed *Withers* in *Franklin County, Kentucky v. Malone*.¹¹⁵ In *Malone*, a prisoner committed suicide while in custody.¹¹⁶ The administrator of the prisoner's estate brought a wrongful death action against the attending police officer, several county officials, the county, and the state.¹¹⁷ The circuit court dismissed the complaint.¹¹⁸ "The Court of Appeals reversed in part and held that the sovereign immunity of [Franklin County] had been waived to the extent of liability insurance purchased" by the county.¹¹⁹ The supreme court reinstated the circuit court's decision in favor of summary judgment based on the philosophy of *Withers*, which held that the purchase of liability insurance was not a waiver of sovereign immunity.¹²⁰ Thus, because counties receive the sovereign immunity

¹¹² See *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 817 (Ky. 1991); *Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 329 (Ky. 1991).

¹¹³ See *Withers v. University of Ky.*, 939 S.W.2d 340, 346 (Ky. 1997). Notice to the attorney general of a constitutional challenge to a statute is required. See K.R.S. § 418.075 (Michie 1992).

¹¹⁴ *Withers*, 939 S.W.2d at 346.

¹¹⁵ *Franklin County, Ky. v. Malone*, 957 S.W.2d 195 (Ky. 1997).

¹¹⁶ See *id.* at 198-99.

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 199.

¹¹⁹ *Id.*

¹²⁰ See *id.* at 203.

protection of section 231 and are not included in the Board of Claims Act, the court reasoned Mr. Malone could not recover against Franklin County.¹²¹

In *Malone*, the court acknowledged the factual similarity between *Berns* and *Withers*:

It could be argued that *Withers*, like *Berns*, was an extension of the pure governmental function. However, in this case there is clearly a government responsibility and a discharge of that responsibility although it is claimed to have been negligent. Accordingly, because the particular case before us involves a clear governmental duty, and this Court has chosen to extend the protection of sovereign immunity to even possibly marginal claims of governmental activity, we must conclude that the protection of sovereign immunity against civil lawsuit is available to the parties sued in this action.¹²²

Essentially, the *Malone* decision does nothing to further the doctrine of sovereign immunity. To summarize, the court simply stated that the *Withers* philosophy applies to counties.¹²³ The governmental function of a jail is obvious. Even the dissenters in *Withers* signed on to the *Malone* decision.¹²⁴ The *Malone* court did not address, however, the constitutional questions raised by the jural rights doctrine as applied to the court's application of sovereign immunity and resorted to the Board of Claims for a remedy.

Not all jurists and commentators are convinced that section 14 supports a jural rights doctrine. Professor Thomas Lewis argues that sections 14, 54, and 241 were never meant to be read together.¹²⁵ In Professor Lewis's discussion of *Johnson v. Higgins*,¹²⁶ a court of appeals case decided in 1861,¹²⁷ he points out that the plaintiff based a jural rights argument upon article 13, section 15 of the 1850 constitution¹²⁸ (the precursor to section 14

¹²¹ See *id.* at 204-05.

¹²² *Id.* at 205.

¹²³ See *id.*

¹²⁴ Justices Wintersheimer and Graves, who dissented in *Withers*, joined the majority opinion in *Malone*. Justice Stumbo, who also dissented in *Withers*, partially concurred in *Malone*. See *id.*; *Withers v. University of Ky.*, 939 S.W.2d 340, 346 (Ky. 1997).

¹²⁵ See Lewis, *supra* note 100, at 954.

¹²⁶ *Johnson v. Higgins*, 60 Ky. (3 Met.) 566 (1861).

¹²⁷ See Lewis, *supra* note 100, at 967.

¹²⁸ KY. CONST. art. XIII, § 15 (1850).

of the current constitution).¹²⁹ The *Higgins* court rejected a jural rights doctrine in favor of a simpler construction.¹³⁰ The court held that the “open courts” provision meant only that the courts should be open and fair.¹³¹ The court concluded that “[a]ny other construction would make [section 15 of the 1850 constitution] inconsistent with other clauses of the constitution, and, in fact, render it practically absurd.”¹³² Professor Lewis concludes that the jural rights doctrine is nothing more than a judicial invention that has no constitutional basis.¹³³

Despite Professor Lewis’s scholarship, the supreme court reaffirmed the legitimacy of the jural rights doctrine in *Williams v. Wilson*.¹³⁴ In *Williams*, the court addressed the constitutionality of the Kentucky punitive damages statute.¹³⁵ The statute required a standard of “subjective awareness” on the part of the defendant before a plaintiff could request punitive damages.¹³⁶ The defendant in this case was represented before the court but did not make a personal appearance at trial.¹³⁷ Thus, the plaintiff could not show “subjective awareness” in accordance with the statute and challenged the constitutionality of the statute, asking instead for a common law jury instruction of gross negligence.¹³⁸ The trial court held the statute unconstitutional and allowed a “punitive damages instruction based on common law gross negligence.”¹³⁹

The court of appeals held that the punitive damages statute offended sections 14, 15, and 241 of the Kentucky Constitution by precluding the common law right to seek punitive damages.¹⁴⁰ The Kentucky Supreme Court affirmed both lower courts, holding that the punitive damages statute violated the jural rights doctrine.¹⁴¹ The court summarized the jural rights doctrine as follows:

¹²⁹ See Lewis, *supra* note 100, at 966-67.

¹³⁰ See *Higgins*, 60 Ky. (3 Met.) at 566.

¹³¹ See *id.*

¹³² *Id.* at 571; see also Lewis, *supra* note 100, at 967 (discussing *Johnson v. Higgins*, 60 Ky. (3 Met.) 566, 571 (1861)).

¹³³ See Lewis, *supra* note 100, at 967.

¹³⁴ *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998).

¹³⁵ See *id.* at 260.

¹³⁶ See K.R.S. § 411.184 (Michie 1992).

¹³⁷ See *Williams*, 972 S.W.2d at 261.

¹³⁸ See *id.*

¹³⁹ *Id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.* at 269.

Sections 14, 54 and 241 have been interpreted to work in tandem and to establish a limitation upon the power of the General Assembly to limit common law rights to recover for personal injury or death. The fact that these provisions might not have been "conceived as some sort of package" does not prevent them from being construed together to arrive at a separate principle.¹⁴²

The court continued "that Sections 14, 54 and 241 of our Constitution render certain common law rights impervious to legislative dilution or destruction. Such rights are therefore subject to the same restrictions with respect to modification by the General Assembly as are constitutional provisions."¹⁴³

The court's opinion is certainly not evidence that the questions concerning the jural rights doctrine have been solved. The court admits that the doctrine has been applied inappropriately in the past.¹⁴⁴ It concludes, however, that those errors were "not from fundamental misconception."¹⁴⁵

The dissenting and concurring opinions took issue with the constitutional basis of the majority's decision. Justice Cooper filed a dissenting opinion that echoed the arguments of Professor Lewis.¹⁴⁶ He argued that the punitive damage statutes addressed only the standard and not the right to sue, even if such a thing as a "jural right" exists.¹⁴⁷ Interestingly, Chief Justice Stephens wrote a concurring opinion stating that the jural rights doctrine, whether correct or not, has been part of the law since at least 1932.¹⁴⁸ Therefore, he argued, although the jural rights doctrine should be reexamined, a public debate should occur before such a long line of precedent is overturned.¹⁴⁹

D. Resolution of the Conflict Between Doctrines?

The outcome of a constitutional challenge to the sovereign immunity doctrine as set forth in *Withers* is uncertain. Starting with *Perkins v. Northeastern Log Homes*,¹⁵⁰ the Kentucky Supreme Court shifted direction

¹⁴² *Id.* at 267 (quoting Lewis, *supra* note 100, at 972).

¹⁴³ *Id.* at 268.

¹⁴⁴ *See id.* at 269.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* (Cooper, J., dissenting).

¹⁴⁷ *See id.* at 270 (Cooper, J., dissenting).

¹⁴⁸ *See id.* at 269 (Stephens, C.J., concurring).

¹⁴⁹ *See id.* (Stephens, C.J., concurring).

¹⁵⁰ *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991).

and no longer reads the constitutional provisions through the prism of a nineteenth century lens.¹⁵¹ In fact, the court said in *Perkins* that “the Kentucky Constitution must be applied to fundamental jural rights as presently accepted in society, not frozen in time to the year 1891.”¹⁵² The judicial branch has determined that there is something special about the interplay among the sections.¹⁵³ In *Perkins*, the court held that no other state constitution “has anything like the combination of broad constitutional protection of individual rights against legislative interference vouchsafed by our 1891 Kentucky Constitution.”¹⁵⁴ The court stepped back from this statement somewhat in *Williams*,¹⁵⁵ but the point is clear: the jural rights doctrine is here to stay regardless of its origin. The question now should be its application and precisely what it encompasses.

It always has been and should continue to be a function of the courts to determine when state agencies are immune and when they are not. The *Withers* court reaffirmed that “[t]he judiciary has the ultimate power . . . to apply [and] interpret . . . the Kentucky Constitution.”¹⁵⁶ This power

¹⁵¹ See *id.* at 817; see also *McCollum v. Sisters of Charity*, 799 S.W.2d 15, 18-19 (Ky. 1990).

¹⁵² *Perkins*, 808 S.W.2d at 817.

¹⁵³ The cases decided between *Happy v. Erwin*, 330 S.W.2d 412 (Ky. 1957), and *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991), did little to diminish the authority of the three sections combined. See *Perkins*, 808 S.W.2d at 817; *Gould v. O'Bannon*, 770 S.W.2d 220, 222 (Ky. 1989); *Carney v. Moody*, 646 S.W.2d 40 (Ky. 1982); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973); *Kentucky Utilities Co. v. Jackson County Rural Elec. Coop. Corp.*, 438 S.W.2d 788 (Ky. 1969).

¹⁵⁴ *Perkins*, 808 S.W.2d at 818.

¹⁵⁵ See *Williams v. Wilson*, 972 S.W.2d 260, 268 (Ky. 1998).

Perhaps the most controversial aspect of our jural rights decisions has been the “constitutionalization” of newly discovered rights. This heavily criticized concept is best exemplified in *Perkins v. Northeastern Log Homes*

....

Whatever the wisdom of the extension of the jural rights doctrine from its point of origin, i.e., preservation of well established rights to recover damages for negligently inflicted injury or death as recognized in 1891, the outcome in this case does not depend on the validity of any such extension. The rights at issue here were well established in 1891 and the courts below have properly applied the jural rights doctrine to prevent legislative erosion or abolishment.

Id.

¹⁵⁶ *Withers v. University of Ky.*, 939 S.W.2d 340, 342 (Ky. 1997) (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 209 (Ky. 1989)).

includes a court's ability to determine the nature of the state agency as well as the particular function being carried out by the state agency, similar to the factors included in the *Berns* test.¹⁵⁷ The 1986 Board of Claims amendments stripped the judiciary of some of this power. If the jural rights doctrine is enforceable at all, by adopting the Board of Claims amendments, the General Assembly wrongfully usurped the courts' duty to determine immunities according to the common law traditions handed down before the ratification of the constitution in 1891.

The doctrine of sovereign immunity as applied in *Withers* and *Malone* does not hold up well under certain hypotheticals. For example, suppose that two people are injured in an automobile collision. One person is taken in an ambulance to the UKMC and the other is taken to a private hospital. If both persons are treated or diagnosed negligently and an injury is caused, the patient who was by chance brought by ambulance to the University of Kentucky has no rights in the courts of general jurisdiction against the hospital, whereas the patient taken by ambulance to the private hospital does.¹⁵⁸ The UKMC is in competition with other local hospitals in the central Kentucky area. It even advertises for business. Including the UKMC within the umbrella of sovereign immunity under the amendments to the Board of Claims statutes creates an absurd policy result and arguably violates the Equal Protection Clause of the United States Constitution.¹⁵⁹ The dissent in *Withers* points out that "if a teaching hospital is so different from its competitive neighbors, such a policy should be clearly set out by either the General Assembly or as a last resort, developed by this Court."¹⁶⁰

The variety of opinions in the *Withers* court reflects the inherent tension between section 231 and the group of sections 14, 54, and 241. Section 231, if interpreted most broadly, states that the Commonwealth could bar any suit against itself.¹⁶¹ The jural rights sections, if interpreted literally, would allow a Kentucky citizen to sue any state entity.¹⁶² Section 231 authorizes the General Assembly to control the state's liability.¹⁶³ The

¹⁵⁷ See *supra* note 43 and accompanying text.

¹⁵⁸ I would like to acknowledge Joe C. Savage, attorney for Savage, Garner & Elliott and co-ghost writer of the amicus curiae brief for Ms. Withers, who originated this hypothetical.

¹⁵⁹ See U.S. CONST. amend. XIV.

¹⁶⁰ *Withers*, 939 S.W.2d at 348 (Wintersheimer, J., dissenting).

¹⁶¹ See KY. CONST. § 231.

¹⁶² See *id.* §§ 14, 54, 241.

¹⁶³ See *id.* § 231.

jural rights sections place that power exclusively in the hands of the judiciary.¹⁶⁴ These readings seem contradictory.

III. CONCLUSION

The *Withers* decision expanded the sovereign immunity doctrine by limiting the amount of waiver granted by the Commonwealth. The jural rights doctrine is an effective challenge to the sovereign immunity doctrine, within limits. If the court assumes responsibility for determining when sovereign immunity is appropriate, it creates a balancing test between section 231 and the group of sections 14, 54, and 241. Neither the jural rights doctrine nor the sovereign immunity provision in the Kentucky Constitution can be interpreted exactly as they are written. Otherwise, one would contradict the other. Support for the jural rights doctrine implicitly supports judicial interpretation of the appropriate "level" of sovereign immunity the citizens of Kentucky should tolerate. This has been and should remain primarily a legislative function. The courts, however, should continue to interpret the functions of governmental entities in order to preserve the intent of the 1891 ratifiers. Finally, societal and political policy objectives mandate that some level of sovereign immunity remain as a viable doctrine. Governmental functions should remain under the umbrella of sovereign immunity to insure the soundness of decision making without the threat of litigation.

The obvious, if not politically feasible, solution is for the legislature to waive the sovereign immunity of proprietary and corporate arms of state government. The problems with this proposal are twofold. First, there is little economic incentive for the government to shed itself of profitable entities that can compete in private markets without the liability that its competitors confront. Second, there is a scant amount of public support for a rewriting of the Board of Claims Act. The loudest noise is from plaintiffs' attorneys.¹⁶⁵ Conversely, a conspicuous murmur is heard from attorneys defending state entities.¹⁶⁶ The persons most affected by the sovereign immunity defense, injured plaintiffs, are unfortunately not a vocal participant in the debate.

¹⁶⁴ See *id.* §§ 14, 54, 241.

¹⁶⁵ See Brief of Amicus Curiae, Kentucky Academy of Trial Attorneys, *Withers v. University of Ky.*, 939 S.W.2d 340 (Ky. 1997) (96-SC-17-DG).

¹⁶⁶ See Brief for Appellee, *Withers v. University of Ky.*, 939 S.W.2d 340 (Ky. 1997) (96-SC-17-DG).

There is a tremendous barrier preventing collective action from potential plaintiffs who are likely uninformed about the possibility that they will not have a cause of action against the state for its negligent acts. Insuring one's constitutional tort remedies is rarely a politically salient issue until a family member is injured. The *Berns* test must retain its teeth. Thus, courts should continue to balance the damage to the injured person, who stands to recover nothing from the negligent governmental actor, against the potential hindrance to the legislative and executive branches in exercising authority or advancing policies.

