Through the Judicial Looking Glass: The Nebraska Supreme Court in Moral Obligation Land and What It Thought It Saw There

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Through the Judicial Looking Glass: 
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The Court was beginning to get very tired of sitting by its sister branches in the capitol, and of having nothing to do but judging; once or twice it had peeped into the legislative book its sister was reading, but it had no Black Letter Rules or Socratic Dialogues in it, "and what is the use of a book," thought the Court, "without Black Letter Rules or Socratic dialogues?"

So the Court was considering, in its own mind (as well it could, for the hot day made it feel very sleepy and stupid), whether the pleasure of writing a decision would be worth the trouble of getting up and collecting the necessary prior cases, when suddenly a white rabbit with pink eyes ran close by it.

There was nothing so very remarkable in that; nor did the Court think it so very much out of the way to hear the Rabbit say to itself, "Oh dear! Oh dear! I shall be too late!" (when the Court thought it over afterwards, it occurred to it that it ought to have wondered at this, but at the time it all seemed quite natural); but when the Rabbit actually took a precedent out of its waistcoat-pocket, and looked at it, and then hurried on, the Court started to its feet, for it flashed across its mind that it had never before seen a rabbit with either a waistcoat-pocket, or a precedent to take out of it, and burning with curiosity, it ran across the rotunda after it, and was just in time to see it pop into the legislative chamber.

In another moment in went the Court after it, never once considering how in the world it was to get out again.

In his introduction to The Annotated Alice Professor Martin Gardner (no, a different one) notes that G. K. Chesterton once "voiced his

1. With apologies to Mr. Carroll, I have borrowed both elements of my title and various passages from Alice's Adventures in Wonderland to introduce each section of this Article. In the best scholarly tradition, I have used as my version of the text LEWIS CARROLL, THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS (Martin Gardner ed. 1960) [hereinafter, respectively, ALICE and M. Gardner]. Any edition would do, however, and the interested reader may find it amusing to occasionally consult the original, rather than my version. This initial passage appears, as it should, in Chapter I: Down the Rabbit-Hole, at 25.

2. That is to say, not the Martin Gardner who is Steinhardt Foundation Professor of Law at the University of Nebraska College of Law. References to his work tend to appear in somewhat more exalted places. See, e.g., California v. Acevedo, 111 S. Ct. 1982, 1989 (1991)(citing Martin R. Gardner, Searches and Seizures of
'dreadful fear' that Alice's story had already fallen under the heavy hands of the scholars and was becoming 'cold and monumental like a classic tomb.' Uncowed, Professor Gardner defends his decision to annotate the classic child's tale with these observations:

There is much to be said for Chesterton's plea not to take Alice too seriously. But no joke is funny unless you see the point of it, and sometimes a point has to be explained. In the case of Alice we are dealing with a very curious, complicated kind of nonsense, written for British readers of another century, and we need to know a great many things that are not part of the text if we wish to capture its full wit and flavor.

The fact is that Carroll's nonsense is not really as random and pointless as it seems to a modern American child who tries to read the Alice books.

Recently, in Haman v. Marsh, the Supreme Court of Nebraska issued a decision that offers, at least in my estimation, precisely the sort of "very curious, complicated kind of nonsense" that cries out for explanation. Haman wrote, at least in theory, the final judicial chapter in the Commonwealth saga, the sad and sometimes tragic sequence of events precipitated by the failure of one of Nebraska's "industrial" savings and loans and the subsequent inability of a state "guaranty" mechanism to honor its obligations to the depositors it supposedly protected. Haman was actually the court's third foray into the events precipitated by Commonwealth's demise. In two earlier decisions, Security Investment Co. v. State and Weimer v. Amen, the court held that the narrow and precise terms of the various applicable statutes, and in particular the State Tort Claims Act, barred recovery of the...
full insured value of lost deposits, even though it appeared that state officials had engaged in what might otherwise be described as culpable negligence in their “supervision” of Commonwealth. The state, it seemed, had no legal obligation to reimburse the depositors. In Haman the court then took what seemed to be the final analytic step, indicating that not even moral grounds would be sufficient to sustain an attempt by the state to reimburse those who had lost their funds. The court accordingly struck L.B. 272A, a measure enacted in April 1990 and designed to fulfill what many believed to be the state’s moral obligations to the individuals who had lost their funds, as unconstitutional “special” legislation and an impermissible pledge of the “credit” of the state.

There are many who will protest that the opinion and result in Haman are neither “random” nor “pointless.” That case, after all, posed for the court an extraordinary dilemma, forcing it to deal with what at times seem to be the intractable conflicts between the quest for “justice” and the dictates of “law.” The court’s response to L.B. 272A, couched in appropriately judicial terms, was to remind us that “ignorance of the law is no excuse and that everyone is presumed to know the law.”

In this instance the “legal” lesson was that “[c]learly it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution.” The court’s rhetoric was powerful, conjuring up visions of political chaos and economic ruin if a different result was reached. L.B. 272A, it warned, “would instill fear rather than confidence, for it indicates that every time someone is injured, the state will rescue him or her. The result could be either economic bankruptcy or economic suffocation through taxation.” These were dire predictions, but they clearly struck a responsive chord in the minds of a large number of citizens, who believed that “taxpayers can’t be asked to cover the losses of every investor who makes a bad decision, no matter how much sympathy might be extended.”

The sequence of events leading to Haman technically began the day the State Department of Banking (“Department”) closed Commonwealth, although a compelling argument can be made that they started many years earlier when the Department first learned that Commonwealth was in trouble and adopted a policy of virtual benign neglect. The direct impetus was provided the day our version of the

11. Id. (quoting Weaver v. Koehn, 120 Neb. 114, 117, 231 N.W. 703, 704 (1930)).
12. Id. As I will indicate, see infra text accompanying notes 625-32, the bankruptcy “prediction” is itself a virtual impossibility and the taxation warning, even if arguably accurate, none of the court’s business.
White Rabbit, pursuing what it believed to be a just cause and supported by what seemed to be the operative precedents, entered the legislative chamber with L.B. 272A in hand. The Rabbit was, in one sense, decidedly late, arriving on the scene almost seven years after the depositors discovered they were in danger of losing their investments. There were, of course, good reasons for the delay, since it was prompted in large measure by initial efforts to pursue the legal resources available under operative Nebraska statutes. Those attempts, as Security Investment Co. and Weimer attest, were unsuccessful, and there are compelling arguments that they should have failed given the restrictions on state liability imposed by the strict language and narrow exceptions of the State Tort Claims Act. But for many individuals, and not just the aggrieved depositors, the results in those cases sent precisely the wrong signal about state government and the obligations of elected officials toward those who trusted them. Accordingly, the message the White Rabbit carried, in the form of L.B. 272A, was that "principles of fairness"—rather than the dry abstractions of law—"require that the State of Nebraska fulfill the thirty-thousand-dollar guaranty of each and every deposit." The state's obligations were moral, rather than legal, and the Unicameral, with the passage of L.B. 272A signaled its belief that passage of the act "serve[d] a necessary public purpose and will effect a sound and necessary public policy," the restoration in the citizens of Nebraska of their "confidence in the Legislature and in the financial institutions that are organized pursuant to the enactments of the Legislature." But the White Rabbit once again had company, albeit not of quite the same nature as the arguably innocent Alice. For when it entered the legislative chamber an aggrieved citizen invited the Nebraska Supreme Court to follow, an offer it accepted with fatal consequences for L.B. 272A. That is not necessarily an evil thing, as things go, since our constitutional scheme entrusts to the court an essential role in the protection of the public from the excesses of its elected representatives. Indeed, the provision of the Nebraska Constitution that provided the primary basis for invalidating L.B. 272A, Article III, Section 18, was inserted in that document precisely because experience indicated that the legislature all too often became the captive of special

14. There will be a strong temptation to assign identities to the various characters drawn from ALICE, an impulse I have tried to resist. Former Governor Crosby played a significant part in the drafting of L.B. 272A, and it is inviting, and perhaps appropriate, to cast him as the White Rabbit. I do not know how he would feel about this, but it has to be a better role than his prior incarnation as a whooping crane.

15. L.B. 272A, § 2, ¶ 6. L.B. 272A may be found at 1990 Neb. Laws 114. References to L.B. 272A in this Article cite only the specific portion of the Act, without the parallel citation to 1990 Neb. Laws.

16. Id. § 3.
interests whose objectives were at odds with the common good.\textsuperscript{17}

The vision of Moral Obligation Land projected by the court in \textit{Haman} is, however, at odds with that embraced by almost every other state court that has had occasion to explore that realm. More tellingly, careful examination of the methods employed by the court, and the precedents it supposedly applies, reveals, "[t]o paraphrase Churchill, . . . much that is obviously true, and much that is relevant; unfortunately, what is obviously true is not relevant, and what is relevant is not obviously true."\textsuperscript{18} It is, of course, entirely possible that the court said what it means and means what it said in \textit{Haman}. If that is the case, then the decision becomes even more intriguing, for it confirms that the court's vision of its role, and its theory of judicial review, are at odds with both widely accepted notions and its own prior declarations. Concepts of judicial review are necessarily elastic, and it is the prerogative of the court to define them for us. Nevertheless, the inevitable consequences of the approach taken in \textit{Haman} are likely to prove troubling for a court that may not have fully considered its decision to enter this particular arena, much less understood how it is that it will "get out again," if indeed it truly ever wishes to.

It is important to understand at the outset that I assisted one of the parties on the losing side in \textit{Haman}, Security Investment Company, which sought and was granted Intervenor status by the court in order to participate in the defense of the act. My reaction to the decision is, accordingly, clouded somewhat by the perspectives and emotions of a spurned suitor. Nevertheless, I believe that \textit{Haman} offers valuable lessons, not just about Commonwealth but about the role, responsibilities, and techniques of Nebraska's court of last resort. I also believe that as someone who has invested considerable time and energy in the case I have a special ability to capture, if not its wit, at least whatever wisdom it imparts. With that disclaimer in mind then, I invite the reader to join me in a trip through Moral Obligation Land.

II. SETTING THE STAGE: THE COMMONWEALTH FIASCO

\begin{quote}
So the Unicameral called softly after it, "Mouse dear! Do come back again, and we won't talk about torts or sovereign immunity either, if you don't like them!" When the Mouse heard this, it turned and swam slowly back to the Unicameral; its face was quite pale (with passion, the Unicameral thought), and it said in a low, trembling voice, "Let us get to the shore, and then I'll tell you my history, and you'll understand why it
\end{quote}

\textsuperscript{17} I both quote the operative language of article III, section 18 and discuss it in considerable detail at \textit{infra Section V.C.}

\textsuperscript{18} National Treasury Employees Union v. Von Raab, 489 U.S. 656, 682 (1989)(Scalia, J., dissenting).
is I hate torts and sovereign immunity."19

The Nebraska State Department of Banking took possession of Commonwealth on November 1, 1983.20 At the same time the Department issued an order directing all other industrials in the state to freeze their depositors' accounts until the "certificates of indebtedness" issued pursuant to the provisions of the Nebraska Depository Institution Guaranty Corporation Act had matured.21 One week later, the district court for Lancaster County declared Commonwealth insolvent and appointed the Department as receiver and liquidating agent for the company. The actions of the Department and court, as anyone (and most assuredly the Department) might have anticipated, destroyed whatever shreds of confidence the citizens of the state might have retained in the industrials. Depositors withdrew whatever funds they could; new deposits became virtually nonexistent. Those industrials that were able to, merged with other financial institutions or sought deposit insurance under the various available federal guaranty programs. Two industrials, American Savings Company of Omaha and State Securities Savings Company of Lincoln, were unable to find a willing partner or secure insurance coverage. They were, accordingly, forced to file for protection and reorganization under the federal bankruptcy statutes.

The Department had known for several years that Commonwealth was in a precarious position; indeed, it had become aware of problems within Commonwealth even before the company became a member of the N.D.I.G.C.22 Successive examinations of the company's books re-

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19. ALICE, supra note 1, at 44 (Ch. 2: The Pool of Tears).
20. This detail, and those that follow, are taken from the separate accounts found in the three decisions of the court that have dealt with Commonwealth to date, Hammer v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991), Weimer v. Amen, 235 Neb. 287, 455 N.W.2d 145 (1990), and Security Inv. Co. v. State, 231 Neb. 536, 437 N.W.2d 439 (1989). I provide citations only where the information is either quoted directly or especially pertinent.
21. The Act was passed in 1976. See L.B. 948, 1976 Neb. Laws 738. It was initially the Nebraska Cooperative Credit Union Guaranty Corporation Act. That was changed in 1977 to the Nebraska "Depository Institution" Guaranty Corporation Act (N.D.I.G.C.). L.B. 291, § 1, 1977 Neb. Laws 888. Other changes were subsequently enacted, most of which are not material for the purposes of this article. The provisions of the act are codified at Neb. Rev. Stat. §§ 21-17,127 to 145 (1987), and remain in force, even in the wake of Commonwealth. In fact, the only post-Commonwealth legislative response, other than technical amendments to various provisions of the statutes governing industrials, was to require, in 1984, that notice be given to all depositors that "as provided by the laws of the State of Nebraska you are hereby notified that your deposit, savings certificate, certificate of indebtedness, or other similar instrument is not insured." L.B. 899, § 2, 2 1984 Neb. Laws 922, 924. The horse, as they say, was already out of the barn.
22. At the hearings held by the Committee on Banking regarding L.B. 355, the predecessor to L.B. 272A, Dr. Michael Breiner testified that Commonwealth was "short of capital" a year and a half before it became a member of N.D.I.G.C. Committee
revealed "excessive" insider loans, insufficient paid-up capital, insolvency, and fraudulent loan activities. The situation eventually became so bad that the Department, in June, 1983, "appointed a special prosecutor to investigate alleged criminal activities involving Commonwealth and its officers." 23 Nevertheless, up until the very end, the Department believed it inappropriate to do anything other than keep Commonwealth under "supervisory control." Indeed, as the court noted in Security Investment Co., the Department actively concealed Commonwealth's condition, believing that "[d]issemination of information concerning Commonwealth's precarious financial condition would likely have had a widespread adverse impact on the industrial loan and investment industry in Nebraska—a situation which the Department undoubtedly desired to avoid or minimize." 24

The prospects for those who had deposited funds with the industrials were, at least in theory, not terrible. Deposits in industrials were "insured" under the provisions of the Guaranty Act, which "provide[d] a mechanism whereby the shareholdings, savings, and deposits of any member or depositor of a member depository institution shall be protected or guaranteed up to amounts which are established by the corporation..." 25 The corporation, which could be formed by any ten or more depository institutions, established an initial guaranty amount of $10,000 per account. That ceiling was subsequently raised by the Department in April 1980, at the corporation's request, to the $30,000 level in effect at the time Commonwealth was seized.

The guaranty was clearly a private one. The statutes made it clear, at least to those who were aware of or read them, that "[n]o state..."
MORAL OBLIGATION

funds of any kind shall be allocated or paid to the corporation."\textsuperscript{26} They also indicated that there would be "no liability for damages on the part of, and no cause of action in tort of any nature [to] arise against" any member institution, the corporation, or the Department "unless such action shall be willful, wanton, or fraudulent."\textsuperscript{27} That, at least in theory, was not a problem since the corporation was authorized to levy an "initial membership fee," annual "growth fees," and "uniform annual assessment[s]" from each member institution.\textsuperscript{28} These funds would, in turn, be applied to the payment of any "covered claim," a deposit "guaranty" that each member institution was obligated to "display at each place of business maintained by it [in] a sign or signs indicating that its member or depositor accounts are protected by the corporation and shall include in all of its advertisements a statement to the effect that its member or depositor accounts are protected by the corporation."\textsuperscript{29}

Unfortunately, the corporation turned out to be, just like Commonwealth, a hollow shell. At the time Commonwealth was seized the corporation had assets of approximately two million dollars. The claims against Commonwealth at the time of its collapse were estimated at some $58 million, a sum that far exceeded both the available N.D.I.G.C. funds and what could be realized by liquidating Commonwealth's own assets. Accordingly, when the pittance in the hands of the corporation was paid to the Commonwealth receiver, it left both the Commonwealth accounts and those from the other eligible industrial accounts legally uninsured. Since the payment represented only a small fraction of the funds owed to the Commonwealth depositors, much less the additional millions required to reimburse the depositors in the other two institutions, the receiver filed two claims with the State Claims Board ("Board"), alleging that "negligent, willful, wanton, and fraudulent acts of the officers and employees caused the creditors' losses."\textsuperscript{30} The allegations were, of necessity, expressed in terms implying a high level of culpability because of both the express terms of the Guaranty Act and the provisions of the general Tort Claims Act, which in large measure shielded the state from liability for what might be characterized as "discretionary" acts.

The Board issued an initial decision indicating that it "[h]as decided that there is a strong possibility of some liability on the part of the State of Nebraska arising out of certain actions of the Banking Department with regard to the Nebraska Depository Institution Guaranty

\begin{itemize}
  \item \textsuperscript{26} NEB. REV. STAT. § 21-17,135(4)(1987).
  \item \textsuperscript{27} Id. § 21-17,141.
  \item \textsuperscript{28} Id. §§ 21-17,135(3) & (4).
  \item \textsuperscript{29} Id. § 21-17,144.
  \item \textsuperscript{30} Weimer v. Amen, 235 Neb. 287, 290-91, 455 N.W.2d 145, 149 (1990).
\end{itemize}
That determination was subsequently reversed by a special three judge panel of the district court for Lancaster County, which characterized it as “unsupported by competent, material and substantial evidence,” “based on conclusions of law which are clearly erroneous,” and “arbitrary and capricious.” The three judge court, as the Nebraska Supreme Court later noted in Weimer, “clearly went to great lengths in striving to discharge its duty of making a legal determination of whether the board’s decision should be approved . . . .” And, while it characterized the statement as “dicta,” the court nevertheless took pains to quote a portion of the district court’s order, statements that carried special significance in light of subsequent developments:

Were it within our power to base our approval on moral grounds or on concepts of fundamental fairness, we would not hesitate to do so. However, our decision, as the structure of society as a whole, must rest upon the rule of law. . . . Almost all the applicable law is clearly contrary to the position taken by the Receiver. The statutes are clear.

. . . Frankly, we do not and cannot expect the majority of these people [who suffered grievous losses] to understand or appreciate the decision we must make which may appear to be based on legal technicalities. However, we are not free to depart from the law as clearly set forth in the applicable statutes and judicial decisions.

Additional legal maneuvers followed, including both new claims and a lawsuit against the state. During their pendency an agreement was negotiated to “settle” the Receiver’s claims in return for payment of $8.5 million, a sum that was less than one-half of that originally proposed and that the legislature eventually appropriated for that purpose. The district court, after reviewing the proposed settlement, concluded it “was fair, adequate, and reasonable to both the claimants and the State, and could find no legal or other reason to disapprove it.” A “substantial majority” of the depositors disagreed, expressing in a hearing before the district court opposition to both the amount of the settlement and the release of all claims by the Receiver it contained. Nevertheless, the district court approved the settlement and the Receiver signed the release on September 26, 1985, a document that contained the following legislative declaration:

It is specifically understood and agreed that this release shall not prejudice or prevent the Department of Banking and Finance of the State of Nebraska as Receiver of Commonwealth Savings Company from attempting to obtain an additional appropriation from the Legislature of the State of Nebraska as such legislative body may in its discretion determine to be appropriate in the public

31. Id. at 291, 455 N.W.2d at 150 (quoting the Claims Board decision).
32. Id. at 292, 455 N.W.2d at 150.
33. Id.
34. Id.
interest or to meet any moral obligations of the State of Nebraska. It being specifically understood and agreed that this release is not conditioned upon any such appropriation being made nor is it subject to any such appropriation being constitutionally and legally valid.\(^{37}\)

The first of the cases to reach the court, *Security Investment Co.*, followed. In that action Security Investment, successor to the bankrupt State Securities Savings Company, advanced two theories of recovery: that the Banking Department had been "willfully and wantonly negligent,"\(^{38}\) and that principles of equitable estoppel precluded any denial of liability given the Department's decision to "knowingly conceal material facts regarding the financial stability and management of Commonwealth."\(^{39}\) The court, in an opinion written by Justice Shanahan,\(^{40}\) rejected each theory.

The negligence claim could not prevail, the court observed, because the acts complained of fell within the discretionary function exception, a provision of the State Tort Claims Act indicating that the act "does not apply to [a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused."\(^{41}\) Quoting from both a previous Nebraska case, *Wickersham v. State*, and a decision of the United States Supreme Court construing a similar federal tort claims exemption, the court emphasized that the exception covered "policy decisions made in governmental activity,"\(^{42}\) a limitation necessary to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."\(^{43}\) The exception applied in this instance because "while the Department is obligated to enforce Nebraska banking laws . . . the Department is nevertheless vested with broad discretion to determine the method and manner of enforcing state banking laws."\(^{44}\) The court accepted the argument that "[d]issemination of information concerning Commonwealth's precarious financial condition would likely have had a widespread adverse impact on the industrial loan and investment industry in Nebraska—a situation which the Depart-

\(^{39}\) Id. at 548, 437 N.W.2d at 447.
\(^{40}\) This was the only one of the three Commonwealth opinions for which a member of the court was willing to claim authorship. For my views on that subject—and those of the legislature—see *infra* note 77.
\(^{42}\) Id. at 543, 437 N.W.2d at 444 (quoting Wickersham v. State, 218 Neb. 175, 180, 354 N.W.2d 134, 138 (1984)).
\(^{43}\) Id. at 545, 437 N.W.2d at 445 (quoting Berkovitz v. United States, 486 U.S. 531, 536-37 (1988)).
\(^{44}\) Id. at 547, 437 N.W.2d at 447.
ment undoubtedly desired to avoid or minimize."\textsuperscript{45} Accordingly, it held, without addressing in any detail any of the specific negligent acts alleged, that "each of SIC's allegations concerns matters within the discretion of the Department."\textsuperscript{46}

Security Investment's second theory of recovery was predicated on the argument that the Department had "knowingly" concealed certain material facts about Commonwealth, making decisions that undermined the ability of the corporation to insure Security Investment's deposits and "induc[ing] SIC to forebear obtaining alternate deposit insurance."\textsuperscript{47} Security Investment argued that the Department was, accordingly, estopped from denying its obligations under applicable state banking laws and regulations. The court characterized this theory as "based on the Department's alleged concealment of Commonwealth's unsound financial condition."\textsuperscript{48} This was to say the least, a somewhat interesting description in light of what the court had just said about the Department's deliberate, albeit "discretionary," decisions to conceal information about Commonwealth. Be that as it may, the court stated that "the State is not liable for misrepresentation or deceit," citing a provision of the State Tort Claims Act to that effect.\textsuperscript{49} Once again, \textit{Wickersham} provides an interesting counterpoint, even though the particular aspect of tort liability explored in \textit{Security Investment Co.} differed in certain material respects from that present in \textit{Security Investment Co.}. In \textit{Wickersham} the question was whether the state exercised "reasonable care" once it undertook a voluntary act. The court observed that "[a]ny allegation that the State failed to take proper action, namely, failure to disseminate information to Wickersham or to conduct proper tests, is not a reference to any misrepresentation by the State."\textsuperscript{50} The court then held that "[w]here the gravamen of the complaint is the negligent performance of operational tasks rather

\textsuperscript{45} Id.
\textsuperscript{46} Id. at 548, 437 N.W.2d at 447. This technique is curious in light of the posture of the case—which had been dismissed on a demurrer at the district court level—and the indication in \textit{Wickersham}—which came to the court after summary judgment—that "[w]hether the State is entitled to the exemption for 'discretionary function or duty' under the State Tort Claims Act at this stage of the proceedings is a question of fact." \textit{Wickersham v. State}, 218 Neb. 175, 182, 354 N.W.2d 134, 139 (1984). Demurrer and summary judgment present different sets of concerns, and it is entirely possible that the court itself weighed what it believed the facts to be in light of the detailed point and counterpoint created by the Department's actions and the various mandatory and discretionary provisions of the applicable statutes and regulations. Nevertheless, if that determination took place it was without the benefit of any exploration of the facts through the trial process, and was reached in ways and for reasons never explained by the court.
\textsuperscript{48} Id. at 550, 437 N.W.2d at 448 (emphasis added).
\textsuperscript{49} Id. (citing NEB. REV. STAT. § 81-8,219(1)(d)(1987)).
\textsuperscript{50} \textit{Wickersham v. State}, 218 Neb. 175, 182, 354 N.W.2d 134, 140 (1984).
than misrepresentation, the State cannot rely on the misrepresentation exclusion found in . . . the State Tort Claims Act."

Slightly over one year later the court decided Weimer, an action brought by one of the depositors and an association of depositors. This time the challenge was to the settlement, with the plaintiffs contending that the Receiver’s acceptance of the settlement and agreement to the release did not bind them and that, if those actions did in fact preclude additional claims by them, they unconstitutionally denied the depositors access to the courts.

The court rejected the first claim in light of the “plain, direct, and unambiguous language” of the applicable statute, which “allows the receiver to enforce ‘all debts or other obligations of whatever kind or nature due’ to the creditors of the failed institution, including those asserted by the appellants.” The court conceded that there were other avenues available to the depositors. It stated, for example, that “Nebraska law has long recognized that a depositor may have an individual action under this scenario,” namely “if the bank officers fraudulently accepted deposits while knowing the bank was insolvent.” It also held that “a depositor may bring a derivative action to recover for wrongs against the bank or financial institution, which wrongs have indirectly injured depositors, but only after having made an unsuccessful demand on the bank or its receiver to bring suit.” In each instance, however, the claim or theory was not properly before the court since, respectively, “appellants do not sufficiently state such a cause of action” and “[t]he petition makes no such allegation, thereby failing to allege facts sufficient to constitute a cause of action.”

The provision allowing the receiver to act on behalf of the depositors, within the limits specified by the court, was sustained as reasonable. The court indicated that the access provision of the Nebraska Constitution, Article I, Section 13, “is not violated when one party brings an action on another’s behalf.” Due process guarantees were, in turn, not offended, since “the statute has a reasonable relationship to the receiver’s purpose of wrapping up the business of the insolvent institution and treating all creditors equitably and fairly.”

51. Id.
53. Id. at 296, 455 N.W.2d at 153 (citing Higgins v. Hayden, 53 Neb. 61, 73 N.W. 280 (1897), and Wilson v. Coburn, 35 Neb. 530, 53 N.W. 466 (1892)).
54. Id. at 304, 455 N.W.2d at 157.
55. Id. at 296, 455 N.W.2d at 153.
56. Id. at 304, 455 N.W.2d at 157.
57. Id. at 298, 455 N.W.2d at 154.
58. Id. at 299, 455 N.W.2d at 154. The court’s invocation of the low “reasonable relationship” threshold is ironic in light of its subsequent quest for a higher standard in Haman. See infra Section V-A.
the court rejected an "unconstitutional takings" argument, stressing that "appellants' 'property' is not being taken without compensation, but, rather, the enforcement of those rights is given to the receiver (pursuant to the Legislature's power to do so) in order to secure compensation for all creditors in an equitable and nonpreferential manner."59

The nuances and vagaries of tort law and sovereign immunity thus combined to deny the depositors redress, at least to the extent that legal claims might be recognized on the theories advanced by these parties. The doctrinal landscape was one that would almost certainly seem alien to those not versed in the intricacies of sovereign immunity and the State Tort Claims Act. For example, the line of analysis pursued in Security Investment Co. established that the state cannot be held liable when state officials refuse to act, precisely because those actions, while consistent with their duties under the law, might have an "adverse impact" by revealing the truth about an institution on whose stability a large number of citizens depended. Wickersham, on the other hand, provided the analytic foundation for this holding in a decision indicating that if the state does act when it does not have to, it must exercise "reasonable care," a standard far below the "willful and wanton" negligence threshold articulated in the Guaranty Act. Moreover, Wickersham stated that if the case is one of action, rather than inaction, the misrepresentation exclusion does not apply. These are the very sorts of distinctions that led Justice Blackmun to decry the "sterile formalisms" that drive courts to "draw a sharp and rigid line between action and inaction" and, in doing so, fail to recognize that "compassion need not be exiled from the province of judging."60 Little wonder then that our Depositor Mouse turns pale and trembles at the mention of torts and sovereign immunity.

As the extract from the district court decision quoted in Weimer indicated, the court was very much aware that the issues posed in that case and in Security Investment Co. required adherence to "the rule of law" in almost certain contravention of "concepts of fundamental fairness." The willingness of the court to recognize that reality was commendable, even if it provided little real solace to those whose

59. Id. at 300, 455 N.W.2d at 154-55.
60. DeShaney v. Winnebago County Social Servs. Dept., 489 U.S. 189, 212-13 (1989)(Blackmun, J., dissenting). The parallels between DeShaney and the Commonwealth fiasco are striking. Chief Justice Rehnquist, for example, observed that "[t]he most that can be said of state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." Id. at 203. It would be interesting to see what response the Wisconsin Supreme Court would have if a measure to compensate "poor Joshua," predicated on moral obligation, reached it. At least one prior decision of that court, State ex rel. Garrett v. Froehlich, 94 N.W. 50 (1903), suggests that it would reject the claim. My suspicions are, however, that it would not.
supposedly insured deposits now seemed likely to disappear forever. At the same time, the release authorized by L.B. 1 seemed to recognize that there might in fact be reasons “in the public interest” and, in particular, “moral obligations of the State of Nebraska,” that could conceivably produce full settlement of all claims. It was in that spirit that L.B. 272A was crafted, and began its journey to the court.

III. CLOSING THE SHOW: THE HAMAN DECISION

“Oh, so the Bill’s got to come down the judicial chimney, has it?” said the Court to itself. “Why, they seem to put everything upon the Bill! I wouldn’t be in the Bill’s place for a good deal; the precedents are troubling, to be sure; but I think I can kick a little!”

The Court drew its foot as far down as it could, and waited till it heard a little of the argument (it couldn’t guess of what sort it was) scratching and scrambling about close above it; then, saying to itself, “This is the Bill,” it gave one sharp kick, and waited to see what would happen next.\(^1\)

L.B. 272A was signed into law by Governor Orr on April 2, 1990. One week later, the constitutionality of the measure was questioned by Ms. Gayle Haman of Omaha, “a resident of the State of Nebraska” who filed the “action on her own behalf and on behalf of all others similarly situated,”\(^2\) that is, “taxpayers” who “were not depositors in [the] three failed saving institutions.”\(^3\) Ms. Haman brought her challenge as an original action before the Supreme Court, invoking the constitutional provision granting the court original jurisdiction in matters “relating to the revenue” and in “civil cases in which the state is a party.”\(^4\) As filed, her complaint alleged that L.B. 272A violated Article III, Section 18 of the Nebraska Constitution since it created a “closed class, to-wit: the depositors of the failed institutions, which class can never be expanded to include other parties.”\(^5\) She also argued that the act denied her “equal protection of the laws because funds . . . obtained from sales and income taxes upon all taxpayers within the State [would be] expended for the benefit of a special closed class of persons,”\(^6\) and that it “deprives the Plaintiff and all others

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\(^1\) ALICE, supra note 1, at 62 (Chapter IV: The Rabbit Sends in a Little Bill).
\(^3\) Id. \(\parallel 4\). The class was never certified, and the action proceeded as an individual challenge to the act.
\(^4\) NEB. CONST. art. V, \(\parallel 2\).
\(^5\) Petition, supra note 62, \(\parallel 6\).
\(^6\) Id. \(\parallel 7\). It is worth noting, in light of the court's decision, that the plaintiff alleged only a state equal protection claim, predicated on the implicit equal protection guarantee of article I, section 1. The plaintiff did not couch her equal protection claim in terms of the article III, section 18 calculus the court actually employed.
simply situated of property without due process of law."\textsuperscript{67}

Three different entities appeared in defense of the act: the state, as the primary defendant; Security Investment Company, the reorganized successor to the bankrupt State Securities Savings Company, which was granted Intervenor-Defendant status; and the Receiver, Commonwealth Savings Company, which filed a brief \textit{amicus curiae}. The prognosis seemed favorable. The parties defending L.B. 272A, and the individuals who drafted and supported it, had compelling reasons to believe their efforts to shift the inquiry from legal to moral grounds, thereby sustaining the act, would be successful. They argued, for example, that Hawaii, Iowa, Maryland, Ohio, and Utah had all enacted somewhat similar measures allocating state tax revenues to reimburse depositor losses in those states.\textsuperscript{68} They also knew that the Attorney General had issued two opinions during the course of the legislative debate indicating that L.B. 272A and its predecessor, L.B. 356, were, in his estimation, constitutional.\textsuperscript{69}

More importantly, they knew that the legislature had, on numerous occasions in the past, passed measures predicated on considerations and circumstances far less extensive and arguably far less compelling than those articulated in L.B. 272A. They also knew that the court had responded favorably to many of those measures. In the years prior to the establishment of the Sundry Claims Board in 1943,\textsuperscript{70}

\textsuperscript{67} \textit{Id.} \textsuperscript{8} \textit{§} 8. Once again, since the court characterized it as one of "four arguments attacking the constitutionality of L.B. 272A," Haman v. Marsh, 237 Neb. 699, 707-08, 467 N.W.2d 836, 844 (1991), it is significant that none of the plaintiff’s filings or briefs alleged, as an independent claim, that the act violated article XIII, section 3, which states that "[t]he credit of the State shall never be given or loaned in aid of any individual, association, or corporation . . . ." That issue surfaced as a collateral argument in the discussion of whether the class was "permanently closed." \textit{See} Reply Brief of Plaintiff at 15-16, Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991) (No. 90-474).

\textsuperscript{68} Statement of Mr. Robert Crosby, Committee on Banking Records Regarding L.B. 356, at 8-9 (Feb. 13, 1989). This information was also contained in the Barry Stavro article, \textit{supra} note 6. The specific appropriations, and their legal implications in each of these states, are discussed \textit{infra} in Section VII-B-3.

\textsuperscript{69} The Constitutionality of L.B. 272A, Op. Neb. Att'y Gen. No. 90002 (Jan. 18, 1990); The Constitutionality of L.B. 356, Op. Neb. Att'y Gen. No. 89051 (May 18, 1989). Both opinions concluded that the measures were constitutional, a fact the court noted as to the opinion on L.B. 272A when it awarded $10,000 in fees to the attorneys for Ms. Haman. Haman v. Marsh, 237 Neb. 699, 723, 467 N.W.2d 836, 852 (1991). Ms. Haman's attorneys requested the fees on the basis of \textit{NEB. REV. STAT.} \textit{§} 24-204.01(1)(a)(1989), which authorizes their payment when an original "action challenges the constitutionality of an act which the Attorney General has previously ruled constitutional or unconstitutional or as to which he has made no ruling . . . ." The wording of this section seems to authorize the fees regardless of what the Attorney General says or does, and one wonders what it was supposed to accomplish. At least five opinions considering options for reimbursement have been issued in the wake of \textit{Haman}. \textit{See} \textit{infra} note 573.

\textsuperscript{70} L.B. 5, 1943 Neb. Laws 432. The Sundry Claim Board was to "receive and care-
for example, the legislature had routinely appropriated funds for the relief of individual citizens,\textsuperscript{71} their widows and children,\textsuperscript{72} and for what could only be characterized as "gifts" to the widows of state senators who died in office, in the form of a specific appropriation of the salaries the deceased members had not lived to collect.\textsuperscript{73} Those acts and resolutions had, by and large, gone unchallenged. When contested, they had generally survived judicial scrutiny, either expressly or by implication. In 1893, for example, the court noted—with apparent approval—a "legislative gift, or donation, to [one] Maurer contain[ing] an allowance for physical suffering."\textsuperscript{74} In 1922 the court seemed to recognize that there was an exception to the general bar to retroactive legislation "where the retroactive law is based upon the moral right of the class benefited to the remedy given . . . ."\textsuperscript{75} There were exceptions, measures that failed in large part because their terms were either too narrow or belied their expressed purpose.\textsuperscript{76} The court had seemed to make it clear, however, that the problem was not the ability of the state to honor such commitments, but was instead to be found in specific defects in the legislative acts that belied their declarations of intent.

Those deficiencies, it seemed, were not present in L.B. 272A, or at least so the parties arguing in its defense believed. They were, at least according to the court, wrong. On March 29, 1991, the court, in a unan-

\textsuperscript{71} See, e.g., House Roll No. 85, 1893 Neb. Laws 460 ("An Act for the relief of George Maurer").


\textsuperscript{73} See, e.g., L.B. 197, 1945 Neb. Laws 434 ("Appropriation of Salary of Deceased Member of Legislature" (Harry E. Bowman)); L.B. 51, 1945 Neb. Laws 436 ("Appropriation of Salary of Deceased Member of Legislature" (Peter P. Gutoski)).

\textsuperscript{74} State \textit{ex rel.} Sayre v. Moore, 40 Neb. 854, 863, 59 N.W. 755, 758 (1893).

\textsuperscript{75} Wakeley v. Douglas County, 109 Neb. 396, 399, 191 N.W. 337, 338 (1922). The ellipses in the quoted language show my editorial deletion, for the time being, of the second half of the court's statement, which begins with the "disjunctive" word "or," a usage that (to me at least) indicates judicial recognition of two bases for sustaining retroactive laws recognizing moral obligations. The Haman court, as I will note in Section IV.B of this Article, did not choose to recognize this reality.

\textsuperscript{76} The references here are to L.B. 20, 1937 Neb. Laws 455, invalidated in Cox \textit{v.} State, 134 Neb. 751, 279 N.W. 482 (1938), and Senate File No. 269, 1921 Neb. Laws 514, struck by the court in Wakeley \textit{v.} Douglas County, 109 Neb. 396, 191 N.W. 337 (1922). I discuss these acts and cases in detail \textit{infra} at text accompanying notes 389-99 and 136-55.
imous, *per curiam* opinion,77 "held L.B. 272A unconstitutional in three separate particulars, any one of which is sufficient to declare the act void . . ."78 The act, the court found, was predicated on an "unreasonable classification," created an impermissible "closed class," and unlawfully pledged the "credit" of the state.

The court began its analysis with the reminder that "[t]he party claiming that a legislative act is unconstitutional has the burden of establishing such unconstitutionality, and all reasonable doubts will be resolved in favor of constitutionality . . . . Unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional."79 These burdens, which fall equally on the party challenging the statute and the court assessing their claims, are deliberately high. The substantive focus of the *Haman* court was on the constitutional ban on "special legislation," articulated in a lengthy section of the constitution indicating that "[t]he Legislature shall not pass local or special laws," either of certain specified types or when a "general law can be made applicable."80 In this instance the court looked to see if either of two limitations were violated, the ban of "[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever," and the admonition that "[i]n all other cases where a general law can be made applicable, no special law shall be passed." The court stressed that "[b]y definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification

77. The fact that the court indulged, yet again, in its predilection for using the *per curiam* device in an extraordinarily important and potentially divisive case is both consistent with prior practice and curious. *Per curiams* seem to have become the accepted mode for the court when a decision offers the prospect of either receiving intense scrutiny or causing severe distress. See, e.g., State *ex rel* Spire v. Conway, 238 Neb. 766, 472 N.W.2d 403 (1991); MAPCO Ammonia Pipeline v. State Bd. Equal. & Assess., 238 Neb. 555, 471 N.W.2d 734 (1991); Natural Gas Pipeline Co. v. State Bd. of Equal. & Assess., 237 Neb. 357, 466 N.W.2d 461 (1991); Banner County v. State Bd. of Equal. & Assess., 226 Neb. 236, 411 N.W.2d 35 (1987); State *ex rel.* Spire v. Public Employees Retirement Bd., 226 Neb. 176, 410 N.W.2d 463 (1987). One wonders what the court makes of the statutory command that "the reports of every case must show the name of the judge writing the opinion, the names of the judges concurring therein, and the names of the judges, if any, dissenting from the opinion." NEB. REV. STAT. § 24-212 (1989)(emphasis added). Perhaps this illustrates yet another instance of the interpretive phenomenon, venerable in its origin, wherein the terms "must" or "shall" are read to mean "may" or "might." In *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), for example, Chief Justice Rehnquist used "well-accepted canons of statutory interpretation" to read the Missouri statutory command that a physician "shall" perform certain viability tests to mean that the statute "require[d] only those tests that are useful." *Id.* at 514-15 (opinion of Rehnquist, C.J.).

79. *Id.* at 708, 467 N.W.2d at 844 (citations omitted).
80. NEB. CONST. art. III, § 18.
so adopted by the Legislature has a basis in reason and is not purely arbitrary."\textsuperscript{81}

The court did not find, nor arguably could it have, a violation of the first part of this standard. It noted that "the defendants argue [L.B. 272A] was enacted in response to a unique situation involving a class of individuals who suffered a real difference in harm from those outside the class."\textsuperscript{82} That was clearly the case. As the court conceded in \textit{Security Investment Co.}, the decision on the part of the Department to conceal the perilous condition of Commonwealth was "guided and influenced by important considerations of public policy."\textsuperscript{83} Nevertheless, the actions of the Department, as the court implicitly recognized, contributed to the series of events that led to the inability of the corporation to honor the guaranty, particularly in the case of State Security and American Savings. Thus the court in \textit{Haman} neither discussed nor denied the argument that the class recognized in L.B. 272A was either unique or one that "suffered a real difference in harm." It did not, because it could not.

Problems arose, however, at the second part of the standard: the requirement that the classification have "a basis in reason" and not be "purely arbitrary." The court stated that "special legislation" arises "in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification, or (2) by creating a permanently closed class."\textsuperscript{84} It discussed each of these independent requirements in turn, characterizing the first inquiry as "whether payments to a class of failed industrial company depositors bear a reasonable and substantial relation to instilling confidence in the Legislature, its enactments, and the state banking system."\textsuperscript{85}

The court held that it did not, rejecting the claim that there was in fact a moral obligation of the sort the legislature could recognize. It then stated that "[i]t appears the opposite result of that intended by the Legislature in enacting L.B. 272A would occur," arguing that "[t]he act would instill fear rather than confidence, for it indicates that every time someone is injured, the state will rescue him or her."\textsuperscript{86} Finally, it rejected the legislature's claim that L.B. 272A served a wider purpose, stating that "[t]here is no question that L.B. 272A was enacted strictly on behalf of the Commonwealth, American Savings, and


\textsuperscript{82} Id. at 710, 467 N.W.2d at 845.


\textsuperscript{84} Haman v. Marsh, 237 Neb. 699, 709, 467 N.W.2d 836, 845 (1991)(citing City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N.W.2d 74 (1970)).

\textsuperscript{85} Id. at 714, 467 N.W.2d at 847.

\textsuperscript{86} Id. at 715, 467 N.W.2d at 848 (1991). I explore the validity of this claim \textit{infra} at text accompanying notes 625-32.
State Securities Savings depositors." That, the court stressed, was not and could not be a valid exercise of the state police power, citing a 1930 decision, *Weaver v. Koehn*, that held "[c]learly it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution."88

The court then stated that L.B. 272A created a "permanently closed class" because "the group of recipients under the act is identified and fixed by historical circumstance to include only the depositors of Commonwealth, State Securities Savings, and American Savings."89 The court apparently conceded that the actual terms of L.B. 272A were open-ended, for rather than discussing its precise terms, it simply noted that the parties defending the act had argued that there was a "possibility for future growth"90 and that the "plaintiff must prove that the class defined by LB 272A is absolutely closed."91 It declared, however, that "[i]n determining whether a class is closed, this court is not limited to the face of the legislation, but may consider the act's application."92 The arguments advanced by the state and amicus, the court then argued, were incorrect:

> In deciding whether a statute legitimately classifies as special legislation, the court must consider the actual probability that others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation. The conditions of entry into the class must not only be possible, but reasonably probable of attainment.93

L.B. 272A failed this test; "[t]he realities of the situation are that except for a highly improbable set of events the class is permanently closed to future members."94 To hold otherwise, the court stressed, "would be to accept artful draftsmanship over reality."95

The final question was whether L.B. 272A violated the command that "[t]he credit of the state shall never be given or loaned in aid of any individual, association, or corporation . . . ."96 This specific point was neither advanced as a ground for striking the act nor discussed by the plaintiff in her brief on the merits. It arose, rather, as a subset of

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87. *Id.*
88. *Id.* (quoting *Weaver v. Koehn*, 120 Neb. 114, 117, 231 N.W. 703, 704 (1930)).
89. *Id.* at 716, 467 N.W.2d at 848.
93. *Id.* at 717-18, 467 N.W.2d at 849 (citations omitted).
94. *Id.* at 718, 467 N.W.2d at 849.
95. *Id.*
96. NEB. CONST. art. XIII, § 3.
the plaintiff's argument that the class was in fact closed, a reality that meant that the parties defending the act did not have a chance to brief the issue. The court nevertheless seized the opportunity presented and elevated the point to the status of a third independent ground for attacking the validity of L.B. 272A. This was, it should be stressed, entirely appropriate, since the court has held that "where the invalidity of the act is plain, and such a determination is necessary to a reasonable and sensible disposition of the issues presented, we are required by necessity to notice the plain error in the premise on which the case was tried." It meant, nevertheless, that the court did not have the benefit of any insights on the issue that the other parties to the action might have had.

The court indicated that a successful article XIII, section 3 claim required the plaintiff to "prove each of the following elements: (1) The credit of the state (2) was given or loaned (3) in aid of any individual, association, or corporation." The first element was met because "under L.B. 272A the state would be forever liable for the losses of industrial company depositors if we accept, arguendo, that the class in L.B. 272A is open." That, the court observed, "obligated present and future taxes from the state's general fund[,] . . . precisely the activity article XIII, § 3, was enacted to prohibit." This "credit" was "given," in turn, because the state received no "valuable consideration" in return for the funds appropriated; there was no moral obligation, and "[t]he state could never come close to receiving an equal amount to the proposed disposition of funds by acquiring legal claims against industrial companies that had gone bankrupt or were in receivership." And, since the objective of the act was to fulfill the corporation's guaranties, the credit was given "in aid" of a "private corporation." The fact that a collateral public purpose might

98. MAPCO Ammonia Pipeline v. State Bd. of Equal. & Assess., 238 Neb. 565, 584, 471 N.W.2d 734, 746 (1991)(quoting State v. Goodseal, 186 Neb. 359, 368, 183 N.W.2d 258, 263-64, cert. denied, 404 U.S. 845 (1971)). There is considerable room to argue whether resolution of the credit issue was "necessary to a reasonable and sensible disposition" given the court's statement that "any one of [the two special legislation grounds] is sufficient to declare the act void." Haman v. Marsh, 237 Neb. 699, 723, 467 N.W.2d 836, 852 (1991). Since it was an original jurisdiction action, however, it seems clear that the court would have been within its authority to address the credit question if it truly had been necessary, which I believe to have been the case given the serious flaws I describe in the plaintiff's and court's special legislation analysis. By the same token, I also believe that the credit of the state discussion is unsound and unconvincing for reasons I outline infra at text accompanying notes 633-59.
100. Id. at 720, 467 N.W.2d at 850.
101. Id. at 720, 467 N.W.2d at 851.
102. Id. at 721, 467 N.W.2d at 851.
exist, the court argued, was irrelevant: "[t]he prohibition against the pledge of the state's credit does not hinge on whether the legislation achieves a 'public purpose,' when the pledge benefits a private individual, association, or corporation." The state, the court stressed, simply "is not empowered to become a surety or guarantor of another's debts."

Both the state and Ms. Haman filed petitions for rehearing. The state, understandably, sought to have the entire case reexamined, arguing both that the decision was incorrect and that, "if unchanged, may draw into question long existing state programs such as the State Welfare System, the Crime Victim's Reparation Fund, state tort and miscellaneous claims, tax deductions for theft losses, and other programs designed for a defined class of persons." Ms. Haman, in turn, was incensed that the court had taken it upon itself to award, without what she believed to be a necessary factual inquiry, attorneys' fees in only the amount of $10,000. She also felt that she had served a valuable public purpose and was entitled to a larger fee under the "Common Fund" theory.

The court, unconvinced and unimpressed, administered the final kick, denying both petitions without opinion. Whether that in fact lays the matter to rest, either as a political question for the legislature or a legal dilemma for the court, is quite another matter, for there is much more than meets the eye on first reading of the court's particular and, as we shall see, peculiar vision of Moral Obligation Land.

IV. WHAT'S A WORD? JUDICIAL TECHNIQUE IN HAMAN

"Come, we shall have some fun now!" thought the Court. "I'm glad they've begun asking riddles—I believe I can guess that," it added aloud.

"Do you mean that you think you can find out the answer to it?" said the March Hare.

"Exactly so," said the Court.

"Then you should say what you mean," the March Hare went on.

103. Id. at 722, 467 N.W.2d at 852 (citing McGuffey v. Hall, 557 S.W.2d 401 (Ky. 1977)).
104. Id. at 722, 467 N.W.2d at 852.
106. Brief in Support of Motion for Rehearing or New Trial and in Support of Motion for Award of Attorneys' Fees on Behalf of Class at 4-6, Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991)(No. 90-474).
107. Id. at 6-14.
108. The order denying a rehearing is not reported.
"I do," the Court hastily replied; "at least—at least I mean what I say—that's the same thing, you know."

"Not the same thing a bit!" said the Hatter. "Why, you might just as well say that 'Law and Justice' is the same thing as 'Law or Justice!'" 109

One of the striking things about Commonwealth Trilogy is the court's apparent insistence that it, and the parties before it, must adhere strictly to the language and letter of the law. The pervasive theme in both Security Investment Co. and Weimer, for example, is of a court laboring within the strictures imposed by the precise language of the applicable statutes. That is especially evident in Weimer, where the court found it appropriate (indeed, perhaps necessary) to quote at length from the district court's order regarding the unfortunate conflicts between principles of fundamental fairness and "legal technicalities." 110 This need to toe the line—to mean what one says, say what one means, and adhere to the letter of the "law"—also surfaces in Haman, playing a critical role in the court's treatment of two threshold issues, the appropriate standard of review and the legal foundations for judicial recognition of moral obligation.

A. And Versus Or: Basting the State Goose

The court begins its discussion of the standard of review by seizing on what, in my estimation at least, can at worst be characterized as an unintended grammatical error in the defendant's brief. The court nevertheless felt compelled to elevate that error to the level of "uncited" divine revelation, stating that "[t]he defendants argue, without citation, the proposition that 'legislative classifications will be upheld as long as there is some rational basis for establishing the classification or there is a valid public policy reason for establishing the legislative classification.' (Emphasis omitted.) Brief for defendants at 14." 111 The court then lectured the defendants for offering a "disjunctive" and "erroneous" test. 112 The test was "disjunctive," the court tells us, because it would allow "either a rational basis or public policy [to] support the constitutionality of L.B. 272A," a proposition that "we have previously disposed of . . . ." 113 The test was erroneous, in turn, because the inquiry is not in fact rational basis, but "[t]he narrower special legislation prohibition [which] supplements the equal protection

109. ALICE, supra note 1, at 95 (Ch. VII: A Mad Tea-Party).
110. See supra text accompanying note's 52-60.
111. Haman v. Marsh, 237 Neb. 699, 710, 467 N.W.2d 836, 845 (1991). The court actually does this twice, stating later in the opinion that the state "presupposes" an "either/or" approach. Id. at 711, 467 N.W.2d at 846.
112. Id. at 711-12, 467 N.W. 2d at 846.
113. Id.
There is, admittedly, a problem with the formulation the state employed. A careful reading of the applicable cases indicates that the use of the disjunctive "or" was an error, and that the conjunctive "and" was clearly called for. State ex rel. Douglas v. Marsh,115 for example, seemed to provide the analytic matrix adopted by each of the parties; it certainly seems to articulate the foundations for the test recognized by the court. Nothing in that decision indicates that the court envisioned an either/or approach. The operative rule, rather, was that "[c]lassification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation."116 That is, there must be both a "reasonable distinction" and a "reasonable relation" to a legitimate public purpose; all that is lacking from the court's statement of the standard is the conjunction.

Normally, quibbles of the sort raised by the court are of at best passing interest. One accepts the rebuke, the proper standard is outlined, and is then applied to the case at hand. The court's public correction of the offending party may prove embarrassing, but is hardly the end of the civilized world as we know it. In this instance, however, there is a much more serious issue lurking in the court's treatment of an otherwise insignificant point, for the court's grammatical lecture is simultaneously both a sham and excoriates a technique that the court itself subsequently employs, deliberately and to its discredit, at a critical juncture in the Haman opinion.

The first thing one notices about the court's treatment of what the state wrote is that the court found it either necessary or appropriate to recast somewhat the sentence it criticizes, deleting the "emphasis" employed in the original. The reason for this becomes obvious when one examines in somewhat greater detail the passage within which the "offending" sentence is found:

Similarly, the Nebraska Supreme Court, in State ex rel Douglas v. Gradwohl, 194 Neb. 745, 235 N.W.2d 854 (1975), stated the basic rule for determining the validity of legislative classifications: "[t]he applicable principles which must guide us are: 'The Legislature may classify the subjects, persons, or objects as to which it legislates if such classification rests upon differences in situations or circumstances between things dealt with in one class and those

114. Id. at 713, 467 N.W.2d at 846 (citing McRoberts v. Adams, 328 N.E.2d 321 (1975)). I explore the "erroneous" test accusation at length, infra text accompanying notes 111-18. As that discussion indicates, if the test relied on was "erroneous" it was a mistake induced by the state's belief that the court had previously said what it meant and meant what it said.

115. 207 Neb. 598, 300 N.W.2d 181 (1980).
116. Id. at 609, 300 N.W.2d at 187 (quoting Campbell v. City of Lincoln, 195 Neb. 703, 709, 240 N.W.2d 339, 342 (1976)).
dealt with in another." (Emphasis added.) Id. at 749, 235 N.W.2d at 858. Additionally, the Court has held that legislative classifications will be upheld as long as there is some rational basis for establishing the classification or there is a valid public policy reason for establishing the legislative classification. With respect to reasonable legislative classifications, the Court has stated: "While the question of classification is one primarily for the Legislature and in the exercise of this power the Legislature possesses a wide discretion, there must, nevertheless, be some rational basis for the classification." Marsh, 207 Neb. at 607, 300 N.W.2d at 186.

The "emphasis omitted" elements of the passage, as the court reproduces it, are the phrases "rational basis" and "public policy." As the sentence immediately following the one on which the court pounces indicates, the approach adopted by the state was to provide the general rule (quoting Gradwohl) and then flesh out its parameters with successive quotations on the question of rational basis from Marsh (as quoted above) and Gradwohl (not quoted, but trust me). The state then, with regard to the "public policy" parameter, quoted a lengthy passage from City of Scottsbluff v. Tiemann that indicated, in pertinent part, and with the state in its brief again adding "emphasis," that classifications "must be based upon some reason of public policy" and are "proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation." The entire passage is then an exercise in one, two, three; rule, then illustration, supported by lengthy quotations from the court's prior decisions.

Admittedly, the language the court seizes on does not itself constitute a direct quote from a specific decision of the court. Instead, the brief proceeds, in the previous and following sentences, to use the court's prior caselaw to establish that "rational basis" and "public policy" are operative elements of the applicable tests. Thus, the entire segment from which a single sentence is lifted—that sentence supposedly creating a new test from whole cloth—begins by stating the "basic rule" and ends (almost a full page later) with additional quotations documenting the two points the state wished to make. This is hardly the creation of a test without citation. Indeed, if there is any vice evident in this segment of the state's brief it is that the state has quoted ad nauseam, believing that the sheer mass of quoted material, rather than reasoned explanation, would prove persuasive. The court's statements to the contrary, that the state argues "without citation" and "presupposes" an "either/or," are simply untrue. It is, accordingly, difficult to escape the conclusion the unnamed author of the opinion


118. Id. at 14 (quoting City of Scottsbluff v. Tiemann, 185 Neb. 256, 266, 175 N.W.2d 74, 81 (1970)).
either relied on seriously defective assistance from his clerks or pro-
ceeded in this manner on the assumption, clearly mistaken, that no
one would reread the briefs and call his bluff.

These, admittedly, are harsh statements, criticisms levied with
some reluctance and a deep awareness of their seriousness. They are,
nevertheless, observations I feel compelled to make in light of the con-
sequences that the court's approach had for citizens who relied, appar-
etly mistakenly, on the good faith and honor of Nebraska's public
officials. For even assuming that it was proper for the court to seize so
tenaciously on the state's grammatical error, it is clear, given what
follows, that there is a deeper irony in the court's technique. For the
court's treatment of the ultimate issue in *Haman*, moral obligation,
ignores important realities, realities of which the court most certainly
was aware, and which cast the court's discussion of moral obligation in
a light far less favorable than the one by which it would have us ex-
amine the logic and result of *Haman*.

B. And Versus Or: Cooking the Judicial Gander

Virtually every aspect of *Haman* comes down to two questions.
May the State of Nebraska, speaking through the legislature, and sub-
ject to appropriate judicial review, recognize a moral obligation? If so,
did such a moral obligation in fact exist and provide constitutionally
sound predicates for L.B. 272A?

The court leads us to believe that the first question is irrelevant:
"we need not rule whether a moral obligation would provide reason-
able and substantial support for the classification in question, for we
find that no moral obligation existed."119 It reaches this "result,"
however, by first quoting from *Wakeley*: "this court [has] held that a
moral obligation attaches when there is 'a law [which] is passed notify-
ing and warning the taxpayer and the citizen generally that the state
... will undertake the burden of such damages.' "120 This, the court's
protestations to the contrary, seems to answer at least a portion of the
first inquiry, for the quoted language can only be read as an affirma-
tion that moral obligations can be recognized, albeit, if the court's re-
counting of *Wakeley* is correct, not in the sort of circumstances it
believed arose pursuant to L.B. 272A. This is true, the court informs
us, because "[n]owhere in the NDIGC legislation was such a notifica-
tion or warning present. In fact, the NDIGC Act provides that '[n]o
state funds of any kind shall be allocated or paid to the corpora-
tion.' "121 The court then rejects the argument that "an average de-

120. *Id.* (quoting *Wakeley v. Douglas County*, 109 Neb. 396, 400, 191 N.W. 337, 339
(1922)).
121. *Id.* (quoting *NEB. REV. STAT.* § 21-17,135(4)(1987)).
positor would not know this and would understand that the manner and form of the guaranty notice meant that the NDIGC was backed by the state" with the stern admonition that "[f]or this, we remind the defendants and Amicus of the maxims that ignorance of the law is no excuse and that everyone is presumed to know the law."122

This line of analysis seems compelling, if the question was one of legal rather than moral obligation, and if the doctrines the court relies on are correctly stated. As we have seen, the first of these conditions is not met, nor was it ever intended to be, since no party appearing before the court in support of L.B. 272A argued that the measure represented a discharge of a legal duty. Indeed, the state expressly disclaimed any contention of that sort, stating "[a]t the outset, it should be noted that the defendants do not claim that there is a legal obligation to reimburse depositors of failed industrial savings and loans established and guaranteed pursuant to state statute."123

This being the case, the court's invocation of venerable legal maxims warrants closer scrutiny. As any first year law student knows, the notion that "ignorance of the law is no excuse" plays an important role when the focus is indeed on legal obligations. The court has emphasized that this "is a maxim sanctioned by centuries of experience" and has stressed that the fact "[t]hat it works a hardship in individual instances is [both] a matter of common knowledge [and] of little importance, when compared with the evils which would result from measuring the rights of a litigant, not by the law as it is, but by the law as he understands it to be."124 The court has, accordingly, refused to allow an alien to plead ignorance of the requirements of federal immigration law,125 a stockman to be unaware of brand areas,126 and has in particular demanded that attorneys not plead ignorance of either changes in the law127 or advisory opinions of the State Bar Association guiding their conduct.128

That is as it should be. But it does not seem unreasonable to argue that the calculus should be entirely different when the average citizen—who presumably neither approaches a bank nor reads its advertisements with the Revised Statutes of Nebraska in hand—makes a

122. Id. at 714-15, 467 N.W.2d at 848. As someone who worked on the Intervenor's Brief I suppose I can take some small comfort in the fact that the court did not extend this "gentle reminder" to us.
deposit in an institution that is required by state law to inform her that her accounts are "protected by" the "Nebraska Depository Institution Guaranty Corporation." Both the name of the entity providing the "guaranty" and the requirement of notice were, after all, dictated by statute, realities that lent credence to the notion that the average citizen would suspect that the state is somehow involved. We can, for the sake of argument, grant that the state's involvement did not rise to the level of a legally binding, state funds guaranty, and that the average citizen should somehow, notwithstanding the signs on the bank and language of the advertisements, be aware of this legal fact. For these realities have absolutely no bearing on the issue actually before the court in Haman, whether it was constitutional for the legislature to respond to the problems caused by these impressions because it was the morally proper thing to do. There is, for example, a world of difference between a claim for reimbursement predicated solely on misconduct by the guaranty corporation, and one whose foundations are provided by a multi-year record of mis-, mal-, and nonfeasance by the state officials charged with seeing that the corporation and the institutions it "insures" comply with the law. It was, of course, the latter situation toward which the remedial actions of L.B. 272A were directed.

Interestingly enough, this appears to be a line of argument to which the court should have been receptive, at least given what were presumably the lessons of its own prior decisions. In In re Preisendorf Transport, Inc., for example, the court stressed that "[i]t is true that ordinarily ignorance of the law is no excuse . . . ." It countenanced such "ignorance" in that instance, however, "for appellee was operating under color of authority, color meaning an appearance or semblance, as distinguished from real; that is, an apparent right." The intriguing aspect of the decision is not presented by the "apparent authority," which does not directly arise in the context of Haman, since no one (at least to date) has claimed that state officials were actively soliciting deposits in Commonwealth. Rather, the focus here is on the process by which the appearances were created.

It seems that the State Railway Commission had assumed, incorrectly, that "all holders of certificates issued prior [to In re Neylon, 151 Neb. 587, 38 N.W.2d 552 (1949)] [could] continue to operate thereunder, apparently feeling such authority was not subject to collateral attack in the courts." The erroneous nature of that judgment was subsequently confirmed by the court in R.B. "Dick" Wilson, Inc. v.

130. 169 Neb. 693, 703, 100 N.W.2d 865, 872 (1960)(emphasis added).
131. Id.
132. Id.
a determination that arguably revealed the extent of the operative "ignorance." Nevertheless, the parties in *Preisendorf Transport* "had some right to trust in the judgment of the commission, a body which, under the Constitution and laws of this state, was created for and given authority to regulate the rates and services of common carriers and have general control thereof." The same sort of reliance and authority permeated the events leading to *Haman*. The State Department of Banking was given general supervisory control over both the industrials and the guaranty corporation. The Department, exercising its "discretion," elected not to apprise either the other industrials, the corporation, or the depositors of Commonwealth's perilous condition. The Department also decided, again in its "discretion," not to qualify the binding force of the guaranty advertisement requirements in the statutes. Indeed, the Department authorized an increase in the guaranty level from $10,000 to $30,000 at a period in time when it was already very much aware of the precarious condition of Commonwealth. Those decisions may well, as the court held in *Security Investment Co.* and *Weimer*, have been within the range of discretion required to give meaning to the strict requirements of state tort claims immunity and legal liability. It is, however, another matter entirely to argue that the consequences of those same discretionary acts impose collateral duties on the victims of the Department's judgments, duties sufficient to trigger what the court itself has recognized to be the "individual hardships" that arise from the application of *ignorantia juris neminem excusat*.

This brings us to *Wakeley* and the court's use of the doctrines articulated in that case. The specific question posed in *Wakeley* was whether the legislature, by passing Senate File Number 269, could authorize the county commissioners of Douglas County to reimburse any "state or county officer" for the loss of private property as a result of mob violence. The plaintiff, Arthur C. Wakeley, acting on the basis of the authority apparently conferred by the measure, sued Douglas County, "alleging that a riotous mob had taken possession of the courthouse and burned his library therein kept and used in his work as a judge of the district court." The court rejected the claim, finding that the measure was impermissible "retroactive" legislation, with the primary focus in the opinion falling on the normal bar against ret-

133. 165 Neb. 468, 86 N.W.2d 177 (1957).
134. *In re Preisendorf Transp., Inc.*, 169 Neb. 693, 703, 100 N.W.2d 865, 872 (1960). I should note that *Preisendorf Transport* was not hard to find, even for someone who prepared this article without the benefit of a copy of the Nebraska Digest. It took at most ten minutes, Lexis search to hard copy.
135. See supra note 22.
136. 1921 Neb. Laws 514.
roactive measures. Conceding that "retroactive operation is not always fatal to legislative enactments," the court stressed that there is nevertheless "a clear distinction between that which is harmless or merely curative and that which imposes new obligations or takes away vested rights." 138 Citing Justice Story's opinion in *Society for the Propagation of the Gospel v. Wheeler*, 139 the court indicated that "[t]he latter class has always been condemned, and should be." 140 It then rejected Judge Wakeley's claim, stressing that:

> [F]rom the beginning of jurisprudence, and in practically all the jurisdictions of the United States, it has been generally regarded that the governmental agency is under no duty to make good to the citizen the damage done by the mob, even if the same be due to the omission of such agency to properly govern. 141

Perhaps in recognition of this, Judge Wakeley argued that the county was nevertheless under a moral obligation to him, a position the court refused to embrace. In her brief, the plaintiff in *Haman* characterized this result as one in which the court laid down a rule that "the moral obligation attaches only when 'a law is passed notifying and warning the taxpayer and the citizen generally that the state or municipality will under take [sic] the burden of such damages.' " 142

The unknown author of *Haman* accepted this description, stating (as indicated) that no law provided the appropriate "warning" to either depositor or taxpayer. Unfortunately, as the brief filed on behalf of the Intervenor indicated in no uncertain terms, the phrasing offered by the plaintiff and accepted by the court reads into *Wakeley* a limitation that simply was not present. 143

138. Id. at 399, 191 N.W. at 338.
139. 22 F. Cas. 756 (C.C.D.N.H. 1814)(No. 13,156).
143. See Brief of Intervenor-Defendant Security Investment Company at 22-24, *Ha-
Careful examination of *Wakeley* makes it quite clear that the language quoted in *Haman* related, using the plaintiff and court's own analytic technique, "only" to the specific question of liability for mob violence. Directly prior to the passage quoted in *Haman*, the *Wakeley* court discussed the common law precept that "it has been generally regarded that the governmental agency is under no duty to make good to the citizen the damages done by the mob . . . ." The language employed in *Haman* then followed, addressing directly—and exclusively—whether a moral obligation might arise for "such damages." It is then improper to separate the statement the plaintiff relied on from the specific context in which it was employed, mob violence. Moreover, that contextual reality bore directly on the true underpinnings of the actual result in *Wakeley*—the court's determination that a sense of moral obligation could not possibly have motivated a legislature that allowed reimbursement of only the "state or county officers" harmed:

Looking at it from another point of view, why, if a moral duty rested upon Douglas county to make good the ravages of the mob, did not the Legislature consider the losses of others in the court house, the burned clothing and implements of the janitors, the destroyed private property of clerks who could ill afford to lose? It is quite clear that the Legislature did not legislate upon the ground of existing moral obligation.

As a general matter then, the *Wakeley* court rejected moral obligation as an animating force in the legislation before it, rather than as a doctrine the court would recognize. The reimbursement authorized by Senate File 269 ran only to "state and county officer[s]," rather than to all state and county employees, a limitation that conjured up powerful images of the "haves" protecting the "haves," to the exclusion of "have nots" whose moral claims would be at least equal to if not more compelling than those of their superiors. More importantly, the court made it quite clear that the language regarding the need for a prior "notification" or "warning" provided only a portion of the calculus. For, contrary to the position espoused by the plaintiff and embraced by the court in *Haman*, a proper reading of *Wakeley* on the general question of whether moral obligation can justify retroactive legislation actually begins much earlier in the opinion, where the court observed that "[e]xception to the rule [against retroactive legislation] has been recognized in cases where the retroactive law is based upon the moral right of the class benefitted to the remedy given, or

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*144. Wakeley v. Douglas County, 109 Neb. 396, 399-400, 191 N.W. 337, 339 (1922).*  
*145. Id. at 400, 191 N.W. at 339 (emphasis added).*  
*146. Id.*
where ... there is an existing moral obligation to do or perform the act or duty prescribed thereby."

The rendition of Wakeley that appears in Haman therefore reads out of Wakeley the disjunctive “or,” a term recognizing that moral obligations may arise in a variety of circumstances, “only” one of which is the “preexisting notice” context of liability for mob violence damages. That reality renders the court’s discussion of “ignorance of the law,” which bears only on the second option articulated in Wakeley, beside the point; L.B. 272A is quite clearly an example of the other permissible legislative predicate, a “retroactive law [that] is based upon the moral right of the class benefitted to the remedy given.” More tellingly, the reality of what Wakeley actually states flows from an appreciation of the importance of the word “or,” a term the Haman court apparently believed to be of the utmost consequence just a few paragraphs earlier in its opinion.

Wakeley was, interestingly enough, the second decision of the court dealing with mob violence in Omaha and the legislative response to its consequences. In an earlier case, Cunningham v. Douglas County,148 the court considered the constitutionality of Senate File Number 1,149 a measure passed in special session that authorized Douglas County to issue bonds to rebuild and refurbish the courthouse and restore its records and other property. Three constitutional violations were alleged, each of which was rejected. The most interesting of these (for our purposes) was the claim that the measure was “special” legislation, that is a special law where a general measure could have been enacted. The court characterized the measure as “a classification, based on population and the kind of emergency described” and the issue as “difficult.”150 It then stated, in language that displayed a judicial restraint not evident in Haman, that:

[This] is, in the first instance, a question of legislative discretion. The courts will not interfere with the discretion lodged in the Legislature unless it is apparent that the classification is artificial and baseless, showing an attempt upon the part of the Legislature to violate the provision of the Constitution prohibiting local and special legislation. With much doubt and hesitation, we have concluded that we ought not to hold the enactment void for this reason.151

Judge Letton dissented, stressing that “I realize the conditions in Douglas county, but I believe the majority opinion clearly exemplifies

147. Id. at 399, 191 N.W. at 338 (emphasis added, citation omitted). The omitted language reads “as in the case of Commissioners of Sedgwick County v. Bunker, 16 Kan. 498 [1876],” which I discuss infra at text accompanying notes 361-67.
148. 104 Neb. 405, 177 N.W. 742 (1920).
149. 1921 Neb. Laws 45.
150. Cunningham v. Douglas County, 104 Neb. 405, 408, 177 N.W. 742, 743 (1920).
151. Id.
The old adage that 'hard cases make poor law.' The majority of the court disagreed, deferring to the legislative judgment that this was a reasonable response to a unique situation. The court did not, given the nature of the measure at issue, speak in terms of moral obligation. This was, rather, an arguably simpler question of governmental power. Nevertheless, the willingness of the court to accede to this particular expression of that power, albeit with "much doubt and hesitation," is telling given the subsequent reluctance in Wakeley to approve legislation whose form belied its theoretical motivations.

The Haman court's seeming obsession with grammatical precision, evidenced through its exploitation of a lapse that is not a lapse (and that is, as I will argue later in this article, ultimately of little substantive importance), is accordingly deeply distressing. The court itself, on the central issue in the case, commits the very same sin that supposedly cripples the state's position in defense of the act. The "excuse" of "ignorance" is clearly not available, even assuming that it might somehow be proper for the court to allege that it is not obligated to know the true parameters of the precedents it relies on. The brief for the Intervenor disputed, in detail, the plaintiff's characterization of Wakeley, pointing out the earlier passage and the word "or." The plaintiff, in her reply brief, never addressed this point, choosing instead to simply repeat her original and highly selective quotation of what she purported to be the applicable standard.

The state then made the very same point as an intrinsic part of its petition for rehearing, stating that "[t]his court in its opinion has impliedly changed the disjunctive 'or,' which recognizes that moral obligations may arise in a variety of circumstances, only one of which is the preexisting notice context, to a conjunctive 'and.'"

It would accordingly seem that in the court's version of Moral Obligation Land the need for precision of expression is very much a question of whose ox is being gored. It also appears that while ignorance of the law may not constitute an acceptable excuse for some parties before the court, a deliberate refusal to acknowledge what one in fact

152. Id. at 409, 177 N.W. at 743 (Letton, J., dissenting). In 1927, perhaps spurred by Wakeley and Cunningham, the legislature enacted a limited mob violence measure imposing liability where a death occurs when "a person taken from officers of justice by a mob and assaulted with whips, clubs, missiles, or in any other manner . . . " House Roll No. 401, § 2, 1927 Neb. Laws 397, 397. This "lynching law," which was initially codified at NEB. COMP. STAT. §§ 26-601 to 610 (1929), remained on the books, as NEB. REV. STAT. §§ 23-1001 to 1009 (1962), until the passage of the State Tort Claims Act in 1969. See NEB. REV. STAT. §§ 81-8,209 to 81-8239.06 (1987).

153. See infra text accompanying notes 299-337.


knows will excuse both the court and the side it wishes to support. This is indeed a very curious state of affairs, one that becomes, as we shall see, even more curious the deeper we venture into this particular wonderland.

V. CHANGING THE RULES: CLASSIFICATIONS IN A POST-HAMAN WORLD

At this moment the Court, which had been for some time busily writing in its notebook, called out, "Silence!" and read out from its book, "Rule Forty-two. All classifications that are not based on a substantial difference to leave the code."

Everybody looked at the Bill.

"I'm based on a substantial difference," said the Bill.

"No substantial difference here," added the Plaintiff.

"You aren't," said the Court.

"Well, the moral obligation won't go away, at any rate," said the Bill; "besides, that's not a regular rule; you invented it just now."

"It's the oldest rule in the book," said the Court.

"Then it ought to be Number One," said the Bill.

The Court turned pale, and shut its notebook hastily. "Consider your verdict," it said to the jury, in a low, trembling voice.156

There is, perhaps thankfully, more to the court's discussion of the appropriate standard of review than its struggle with the vagaries of "and" versus "or." For having explored that matter, the court moves on to argue that "[t]he second flaw in the defendants' presentation is that it relies upon an erroneous test."157 The court's objective, obviously, is to heighten the standard of review. There is, after all, a significant difference between the rather uncritical rational basis test that guides an equal protection claim and what the court assures us is the "narrower special legislation prohibition [that] supplements the equal protection theory."158 The distinction, we are told, "is more than semantical because it affects the burden of persuasion placed upon the plaintiff."159 That is, as we shall see, both precisely the point and not exactly the point, for the court is not telling us that it becomes more difficult for the plaintiff to carry her "burden of persuasion." Rather, the calculus imposes additional obligations on the legislature in enacting the measure and the state in defending it. It also frees the

156. ALICE, supra note 1, at 156 (Ch. XII: Alice's Evidence).
158. Id. at 713, 467 N.W.2d at 846 (citing McRoberts v. Adams, 328 N.E.2d 321 (Ill. 1975)).
159. Id. at 713, 467 N.W.2d at 847.
court itself to speculate in ways denied it under a rational basis rubric. The process by which the court reaches the result it fashions, and the implications of the result itself, are interesting. The process is important because close examination reveals that the court employs precisely the same sort of sloppy and imprecise drafting it has just finished excoriating. The result, in turn, is even more significant because of the substantial implications it has for special legislation claims in Nebraska in the wake of Haman.

A. Classifications and Haman: Fashioning a New Rule

The court begins by indicating that there has been a consistent line of Nebraska cases affirming that economic and social legislation, challenged on an equal protection basis and not implicating a fundamental right, will be tested by the rational basis standard. That is, all that is required is that "there be a rational relationship between a legitimate state interest and the statutory means selected by the Legislature to accomplish that purpose." That means, as the court observed in an earlier decision, that "a statute may discriminate in favor of a certain class if the discrimination is founded upon a reasonable distinction, or difference in state policy, or if any state of facts can reasonably be conceived which would sustain the classification."161

The court then initiates a transition from equal protection to special legislation, asserting that the test is "narrower" and citing an Illinois decision, McRoberts v. Adams,162 for the initial proposition that this "narrower" test "supplements the equal protection theory." Three Nebraska cases are then mentioned, supposedly establishing that the test is different, that is that "[c]lassifications must be based on some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified."163 The court concedes, coyly citing then Judge now Justice Souter, that there has been "a judicial tendency to blur the difference between the two tests, leading to the present confusion."164 It then ends this section of the opinion with a statement of the "correct" test, borrowed from a Virginia case, that the statute must have "'a reasonable and substantial relation to the

160. Id. at 712, 467 N.W.2d at 846.
162. 328 N.E.2d 321 (Ill. 1975).
164. Id. (citing Dover v. Imperial Casualty & Indem. Co., 575 A.2d 1280, 1287 (N.H. 1990)(Souter, J., dissenting)).
object sought to be accomplished by the legislation.

The first thing that jumps out at someone reading this section of the opinion is that the court seems to find it necessary to draw on the decisions of other jurisdictions to establish its point. The court relies, as indicated, on an Illinois decision for the notion that special legislation "supplements" equal protection and derives the "applicable" and arguably "narrower" test from a Virginia case. There is nothing particularly wrong with this, at least in one sense, since it is the court's responsibility to establish the analytic standards that guide constitutional inquiries. If, using Justice Souter's terms, the court wishes to allow "[m]iddle-tier equal protection scrutiny" to enter "the jurisprudence of the State Constitution," that is for the court to decide and us to accept. It is also quite appropriate for the court to draw on the wisdom of other courts of last resort where, as it would seem to be the case given the manner in which the Haman court proceeds, there are either no applicable Nebraska cases or those that do bear on the issue stand for propositions different than those the court now seeks to embrace. Of course, the court seemed to be implying that the stricter standard had in fact been the rule in Nebraska all along, which, if true, makes the need to turn to Illinois and Virginia somewhat puzzling. More importantly if, as I will argue, the court is in fact massaging, if not changing the rules, it ought to at least let us know that this is what is afoot. However, the court does not make the concession; indeed, the court goes to rather intriguing lengths to avoid it. There are, however, very good reasons why none of this happens: the Nebraska cases simply do not support the court's inferences, and the decisions borrowed from Illinois and Virginia do not provide an especially sound basis for this particular application of this new-found test.

The court's attempt to establish that a distinction between equal protection and special legislation analysis had in fact been recognized in Nebraska is singularly unconvincing. The court begins this process by stating the general rule and citing three cases that supposedly establish the parameters and purity of the equal protection rubric. In the first of these, Distinctive Printing & Packaging Co. v. Cox, the court sustained a provision in the parental liability statute that limited the liability of parents whose children inflict intentional personal injury but not that of parents whose children inflict intentional property damage. The measure was challenged on both special legislation and equal protection grounds, and it is difficult, if not

165. Id. (quoting Benderson Dev. Co. v. Sciortino, 372 S.E.2d 751, 757 (Va. 1988)).
impossible, to see any differences in the manner in which the court handled the two issues. The court began by stressing that "article III, § 18, concerns itself with disparate treatment in much the same manner as does the language of U.S. Const. amend. XIV . . . ."\textsuperscript{169} It then stated that "[t]he Legislature is permitted to classify persons as long as, absent implication of a fundamental right or suspect classification, the legislative categorization has a rational basis."\textsuperscript{170} That test, in turn, imposed on the court the obligation to "look to see if any state of facts can be conceived to reasonably justify the disparate treatment which results."\textsuperscript{171} The analysis in \textit{Distinctive Printing} does not, accordingly, distinguish between the equal protection and special legislation approach, much less impose a "narrower" inquiry in the latter instance.

The same is true of the other two "equal protection, rational basis" cases cited by the court, \textit{Snyder v. IBP, Inc.}\textsuperscript{172} and \textit{Drennen v. Drennen},\textsuperscript{173} which were, interestingly enough, decided on the same day. In \textit{Snyder}, the equal protection standard was "whether the distinction is 'founded upon a reasonable distinction, or difference in state policy, or if any state of facts can reasonably be conceived which would sustain the classification.'"\textsuperscript{174} The special legislation test, in turn, is whether there is "some reason of public policy, some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified."\textsuperscript{175} The latter approach, admittedly, seems to add a new element to the inquiry, the need for a "substantial" difference in situation or circumstances. In this instance, however, the legislation was struck simply because the court was "unable to discern any reasonable basis for denying injured workers the right to a modification of an award of compensation merely because the award is payable periodically over a period of less than 6 months."\textsuperscript{176}

\textit{Drennen} focused on the constitutionality of the state’s use of a referee system in child support cases. The court found that the system impermissibly denied the state constitutional right of access to a state district court and that it also deprived the parties due process of law.\textsuperscript{177} The court also explored an equal protection claim since the

\begin{flushleft}
\textsuperscript{170} \textit{Id}.
\textsuperscript{171} \textit{Id.} at 852, 443 N.W.2d at 571 (citation omitted).
\textsuperscript{172} 229 Neb. 224, 426 N.W.2d 261 (1988).
\textsuperscript{173} 229 Neb. 204, 426 N.W.2d 252 (1988).
\textsuperscript{175} \textit{Id.} at 227, 426 N.W.2d at 264.
\textsuperscript{176} \textit{Id}.
\textsuperscript{177} Drennen v. Drennen, 229 Neb. 204, 216, 426 N.W.2d 252, 259 (1988).
\end{flushleft}
system distinguished between two classes of potential cases, those falling within the “IV-D” provisions of the federal Child Support Enforcement Program and those that did not. The court stressed that Nebraska has no “specific” equal protection clause, but that the special legislation prohibition contained in article III, section 18 operated as its functional equivalent. It then articulated the test as a quest for a “real differences of situation and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment.” That is, there must be a “rational basis” for treating the two classes of cases differently. Finding none, it held that “the Referee Act is unconstitutional as violating the equal protection clause of the U.S. Constitution and Neb. Const. art I, § 13, and art. III, § 18.”

It is of course possible to argue that, for analytic purposes, the court went only as far as it had to in Snyder and Drennen. Legislation that cannot survive even a rational basis review would obviously fail, even more miserably, if subjected to heightened scrutiny. That would not, however, explain how the measure at issue in Distinctive Printing survived, if in fact there is a real difference in approach. Nor does it explain why a court that is supposedly reaching a result within an analytic matrix that invokes various tests never actually describes the options available. There is, actually, nothing in any of the three opinions to indicate that the court was drawing such distinctions, and even the most careful reading of these three cases supports the impression that the applicable tests are one and the same.

The three cases that supposedly do make this distinction do not appreciably change the analysis. The first of these, State ex rel. Douglas v. Marsh, focused on the constitutionality of L.B. 882 of 1980, which created the Local Government Revenue Fund. The court held that certain provisions of the act violated the ban on special legislation because it “created a frozen classification into which no other county may enter even though it may subsequently acquire the very same characteristics which afforded the first county the benefits it receives.” There is no mention of equal protection; the sole issue is special legislation, and the test is characterized as the need for “some
rational basis for the classification."\(^{185}\) The court, quoting from *City of Scottsbluff v. Tiemann*,\(^{186}\) did indicate that there must in fact be "some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified."\(^{187}\) The legislation failed, however, because the classification was not "reasonable." Rather, it was "based upon happenstance events in a given year and therefore remains forever, regardless of the changes in circumstances ...."\(^{188}\) The same phenomenon is evident in a second case discussed, *Dwyer v. Omaha-Douglas Public Building Commission*.\(^{189}\) The court could "not say the classification used by the Legislature here is clearly arbitrary and without any substantial basis founded upon real differences."\(^{190}\) The court speaks in terms of "reasonable classifications," however, and there is nothing in the opinion to indicate that the level of scrutiny employed is somehow different, much less more intense, than the traditional quest for a "reasonable" explanation. In particular, the court stressed that the legislature "can certainly take cognizance of [certain population fact[s]],"\(^{191}\) an approach that seems well within the search for simply some "state of facts [that] can reasonably be conceived which would sustain the classification."\(^{192}\)

The third case cited, *Prendergast v. Nelson*,\(^{193}\) is perhaps the most interesting, for it supplies a direct link to the non-Nebraska authorities cited in *Haman*. *Prendergast* dealt with the constitutionality of the Hospital-Medical Liability Act.\(^{194}\) In his opinion for the court, Judge Spencer indicated that the defendant had argued that "the act operates to single out a class of people for special treatment, but bears no rational relationship to the legitimate purposes of the legislation."\(^{195}\) He then stated "[w]e do not agree,"\(^{196}\) and in the course of his explanation quoted from *Taylor v. Karrer* to the effect that the classification must rest on "some substantial difference of situation or cir-

\(^{185}\) *Id.* at 607, 300 N.W.2d at 186 (1980)(citation omitted).

\(^{186}\) 185 Neb. 256, 175 N.W.2d 74 (1970).


\(^{188}\) *Id.*

\(^{189}\) 188 Neb. 30, 195 N.W.2d 236 (1972).

\(^{190}\) *Id.* at 50, 195 N.W.2d at 248.

\(^{191}\) *Id.*


\(^{196}\) *Id.*
cumstance.’”197 He then concluded the analysis by simply stating that “[t]he classification does have a reasonable basis.”198 In their various dissenting opinions, however, four members of the court made it clear that this portion of the opinion did not command their vote. Judge White, the only one to discuss the issue in detail, stated that the holding of the court was limited to the finding that the act “does not provide an unconstitutional grant of state credit.”199 Judge White did not directly address the question of which standard or review applies. He did, however, quote extensively from an Illinois case dealing with similar legislation, and indicated that the Illinois special legislation provision is “strikingly similar” to article III, section 18.200

Illinois is, as indicated, the jurisdiction that gave us *McRoberts v. Adams*, the case cited in *Haman* for the proposition that the special legislation prohibition “supplements” equal protection. Illinois is also the state within which one finds case law “contra” to the *Benderson Development* “reasonable and substantial relation” rule the *Haman* court adopts.201 This conclusion is expressed in the case cited in *Haman*, *Bilyk v. Chicago Transit Authority*, where the Illinois court stated that “[w]hether a law is challenged as special legislation or as violative of equal protection, the controlling question is the same: Is the statutory classification rationally related to a legitimate State interest?”202 The question is implied in *McRoberts*, where the court speculated at length about the various justifications that the legislature “may” have had in mind when it passed the measure under attack in that case.203

*Prendergast* seems accordingly to stand for quite a different proposition than the one it is marshalled to support. This dislocation between the principle articulated by the *Haman* court and the reality that prevails is even more startling when we examine the court’s appeal to the wisdom of Justice Souter. Justice Souter, while still on the New Hampshire Supreme Court, discussed so-called “middle-tier scrutiny,” indicating that “[a]n understanding of that intermediate character and the limits of such review can prove elusive, . . . and it is well to acknowledge that Carson’s test suffers from a proven susceptibility to confusion with other standards of equal protection review . . . .”204

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197. *Id.* at 112, 256 N.W.2d at 667-68 (quoting Taylor v. Karrer, 196 Neb. 581, 244 N.W.2d 201 (1976)).
198. *Id.* at 113, 256 N.W.2d at 668.
199. *Id.* at 132, 256 N.W.2d at 677 (White, J., dissenting in part).
200. *Id.* at 131, 256 N.W.2d at 676 (White, J., dissenting in part).
202. 531 N.E.2d 1, 3 (Ill. 1988).
204. *Dover v. Imperial Casualty & Indem. Co.*, 575 A.2d 1280, 1287 (N.H. 1990)(Souter, J., dissenting). The irony of all of this is that there was at least one good reason to
That is clearly the case, as the Nebraska court's rather loose and interchangeable use of "reasonable" and "substantial" within the same "tests" in, for example, City of Scottsbluff, indicates. It is also a factor that "blurred" the lines in other decisions where the court explored whether a classification was "arbitrary and unreasonable" in circumstances where the court was looking for "some substantial difference of situation or circumstance."

Nevertheless, the clear impression created at this point in Haman is that Justice Souter is wading into the debate on the specific issue at hand, the distinction between equal protection, rational basis review, and the "narrower" special legislation standard. As structured, the argument the court seems to be making is that the distinction exists, that it is important, that it has been recognized in Nebraska, and that it has been characterized as "blurred" by no less a luminary than Justice Souter. It would nevertheless be a mistake to read into Justice Souter's discussion anything at all regarding the supposedly distinctive nature of the inquiry when "special legislation" is the focus, since New Hampshire is one of the ten states that "have not adopted extensive and detailed restraints applicable to such practices." Thus, the constitutional provisions at issue in Dover v. Imperial Casualty & Indemnification Co., and for that matter in Carson v. Maurer, the case that Justice Souter mentions as allowing middle-tier scrutiny to "enter" the arena), are equal protection measures and equal protection measures only.

More importantly, heightened scrutiny was triggered in Dover and Carson, as is usually the case, because of the nature of the right at issue, rather than the express requirements of the constitutional provisions under which it is examined. In both cases the focus is on "the right to recover for personal injuries," characterized as "an important substantive right." The Nebraska court, interestingly enough, had seemed to recognize the need to draw such distinctions in the very same cases that do not, as we have seen, articulate different tests for equal protection as opposed to special legislation purposes. In Distinctive Printing, for example, the court stated that "[t]he Legislature is


206. 2 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 40.01 & n.4 (Norman, Singer ed. 4th Ed. 1986 Rev.)(emphasis added).

207. 424 A.2d 825 (N.H. 1980).

permitted to classify persons as long as, *absent implication of a fundamental right or suspect classification*, the legislative categorization has a rational basis."209 Thus, where no fundamental right is at issue and the class is not suspect, the task, in a case that examines equal protection and special legislation claims in the same manner, "is one of determining whether a rational basis exists for the classification."210

This tendency to restrict equal protection review to either strict or rational basis scrutiny is apparent in almost every prior Nebraska case that discusses the subject. In a decision issued less than a year before *Haman*, for example, the court indicated that "[t]he standard of review used by courts when reviewing statutes challenged on equal protection grounds depends upon the nature of the classification and the rights affected."211 It listed two tests, strict scrutiny when "the classification involves either a suspect class or fundamental rights," rational basis when it does not.212 And it crafted this discussion in a case where the predicate was recognition that the equal protection guaran-
tee flows from *article III, section 18*, which "deals with disparate treatment by special legislation."213 The same approach is evident in numerous other cases, none of which expressly embrace intermediate level scrutiny in any equal protection context.214 That silence occurs, moreover, even though the court has occasionally listed both gender and illegitimacy as distinctive classes and cited, with apparent approval, decisions of the United States Supreme Court articulating an intermediate test for classifications affecting those groups.215 It may be, as seemed to have been the case in New Hampshire, that there are situations in which the distinctions between rational basis and intermediate-tier scrutiny are blurred, either for equal protection or special legislation purposes. In Nebraska, however, any softening of these jurisprudential edges would, it seems to me, have had to wait for the new test to be created, a turn of events that did not, as best I can determine, materialize until *Haman*.

This brings us to the final non-Nebraska case, *Benderson*, from which the court extracts the specific rule applied in *Haman*, that clas-

210. Id.
212. Id. at 615, 456 N.W.2d at 491.
213. Id. at 614, 456 N.W.2d at 490.
215. See, e.g., Landon v. Pettijohn, 231 Neb. 837, 842-43, 438 N.W.2d 757, 761 (1989)(cit-
sifications bear a "'reasonable and substantial relation to the object sought to be accomplished by the legislation.'" Benderson does, as the court indicates, state that there is a difference between equal protection and special legislation analysis in Virginia. The absolute force of that observation is substantially undermined, as an initial matter, by the Haman court's immediate concession that other states do not recognize the distinction. Thus, while the court quotes from Benderson to give us the "correct" rule, it does to its credit indicate that reasonable minds may and do disagree on this matter; "[c]ontra, Bilyk." 217

Even if that were not the case, the value of what the court offers us is seriously eroded when one looks closely at Benderson itself, a decision in which the Virginia court was considering the continuing constitutionality of a Sunday closing measure that had, with the passage of time, been amended to the point that it had become a special law "as applied" to the few businesses still subject to its strictures. The Virginia court did, as Haman indicates, state that there is at least a verbal difference between equal protection and special legislation scrutiny. State laws "which make economic classifications," the court observed, will survive equal protection scrutiny "'unless the classification rests on grounds wholly irrelevant to the achievement of the State's objectives'... or unless the law 'is so unrelated to the achievement of a legitimate purpose that it appears irrational.'" 218 Special legislation, "[o]n the other hand, ... must bear 'a reasonable and substantial relation to the object sought to be accomplished by the legislation.'" 219

Whether the distinction actually means much of anything is an entirely different matter altogether. In the case that articulated the test quoted in Benderson the Virginia court stated that "[t]he necessity for and the reasonableness of the classification are primarily questions for the legislature. If any state of facts can reasonably be conceived that would support it, that state of facts at the time the law enacted must be assumed." 220 It may be that the ultimate objective is a "reasonable and substantial" relationship; the analytic touchstones, however, are strikingly similar—mirror images, actually—to the traditional rational basis test. Indeed, it is precisely the sort of inquiry conducted in Illi-

217. Id. (citing Bilyk v. Chicago Transit Auth., 531 N.E.2d 1 (11M. 1988)).
219. Id. (quoting Mandell v. Haddon, 121 S.E.2d 516, 525 (Va. 1961)).
220. Mandell v. Haddon, 121 S.E.2d 516, 524 (Va. 1961)(emphasis added). The Virginia court has also held that "it is settled law that a valid appropriation may be made to discharge a purely moral obligation." Commonwealth v. Ferries Co., 92 S.E. 804, 805 (Va. 1917)(refunding illegally assessed taxes).
nois pursuant to *McRoberts* and *Bilyk*, cases that are supposedly “contrary” to the “proper” approach spelled out by the Virginia court. More tellingly, that analytic approach had been specifically employed in Nebraska, not as a matter of intermediate scrutiny, but rather as the hallmark of a garden-variety rational basis test.

It is accordingly difficult, if not impossible, to discern how the *Benderson* test is in any manner more exacting, or for that matter more helpful, than the standards employed in every other Nebraska case prior to *Haman* or, for that matter, in other states. As a technical matter these realities do not necessarily vitiate the validity of Justice Souter’s statements. One reading of the applicable passage in *Haman* is that the court is simply indicating that there is an inherent lack of precision in a middle-tier test that, without more, tends to blur its parameters, especially vis-à-vis the more tolerant rational basis inquiry. That is not, however, the context within which *Dover* is cited nor, I suspect, the impression conveyed to those reading *Haman* without the benefit of the New Hampshire reports at their elbow.

More importantly, the court at this juncture in *Haman* is lecturing the state for relying on an “erroneous” test, specifically for injecting equal protection inquiries into a realm where they do not belong, special legislation. The court speaks expressly of a “narrower special legislation prohibition.” It attempts to discern support for this proposition in a series of Nebraska cases that do not in fact draw this distinction, and it then cites decisions from other jurisdictions that do not, it seems, embrace a “narrower” regimen with the same degree of fervor and fine distinction that the unnamed *Haman* author does. This is a rather loose approach to what is arguably an extraordinarily important distinction. It is moreover an approach taken by a court that has just castigated the state for using “or” where it should have used “and.” To paraphrase Barry Goldwater, it seems that imprecision in the defense of L.B. 272A is no virtue, while imprecision in pursuit of its demise is no vice.

**B. Classifications and *Haman*: Applying the Rule**

The full implications of this are driven home by a second aspect of the classification debate, the question of whether L.B. 272A creates a “permanently closed class.” The “classic” formulation of this doctrine appears in a 1912 decision, *State ex rel. Conkling v. Kelso*, in which the court stated:

> The rule appears to be settled by an almost unbroken line of decisions that a classification which limits the application of the law to present condition and leaves no room or opportunity for an increase in the numbers of the class by future growth or development is special and a violation of the clause of the constitution above quoted.\(^2\)

\(^2\) 92 Neb. 628, 632, 139 N.W. 226, 227-28 (1912)
The plaintiff in Haman contended that "the group of recipients under the act is identified and fixed by historical circumstances to include only the depositors of Commonwealth, State Securities Savings, and American Savings,"222 Her argument—which, quite frankly, is in many respects difficult to dispute—was that the motivating force for L.B. 272A was a desire to reimburse the depositors in those three institutions, and that the legislature never contemplated, indeed, would have been horrified to be asked to even consider, reimbursement of anyone for future losses.

The various parties supporting the act responded that the measure, on its face at a minimum and quite possibly in actual contemplation, was open. They also pointed out that the plaintiff made her allegations without ever quoting any of the actual language of L.B. 272A, which made it clear, for example, that the class of depositors consisted of any "owners of deposits,"223 with "deposits" defined to include any "certificate of indebtedness or any other evidence of an industrial company's indebtedness which was unpaid when a protected company filed bankruptcy pursuant to Chapter 11... or when a company in receivership entered receivership."224 An "industrial company," in turn, was "any industrial loan and investment company,"225 and a "protected company" any "industrial company that filed bankruptcy... after November 1, 1983."226 As the Intervenor noted:

Plaintiff does not allege that there are currently no industrial loan and investment companies in the state or that she could not—if she chose to do so—deposit funds within one or more of them. Plaintiff does not because the statutes authorizing creation of such companies remain in force, see Neb. Rev. Stat. §§ 8-401 et seq. (Reissue 1987); and two industrials continue to operate subject to the same oversight and inspection by the Department of Banking. (First Stipulation at ¶ 7). Plaintiff also concedes that the Nebraska Depository Insurance Guaranty Act remains in effect and that the Nebraska Depository Insurance Guaranty Corporation ("NDIGC") still exists. (First Stipulation, ¶¶ 8 and 6). The operative statutes now require either affiliation with the Federal Depository Insurance Corporation, Neb. Rev. Stat. § 8-407.03(2) (Reissue 1987), or a warning, both posted at the institution and in all advertisements, that deposits are not insured. Id. at § 8-407.03(3). It is, accordingly, entirely possible that deposits within an industrial, regardless of its affiliation with the hollow shell that is the NDIGC, could in fact be uninsured.227

Finally, they pointed to the statewide support for the measure, both editorially and in terms of the diversity of the senators that voted in

223. L.B. 272A § 1(5).
224. Id. § 1(3).
225. Id. § 1(5).
226. Id. § 1(7).
The court, wisely, did not choose to quibble with or deny these characterizations of the statute. Clearly, many of the findings within L.B. 272A were concerned solely with the problems associated with the failure of Commonwealth and reorganization of American Savings and State Securities. It was equally clear, however, that reimbursement comprised only one of the stated objectives of the act. The legislature, in sections of the act that I will examine in greater detail later in this Article, made it clear that there were in fact multiple goals and that the reimbursement elements of the measure were a means toward their attainment, rather than simply an end in themselves. That, it appeared, brought L.B. 272A squarely within both the first Wakeley exception, “where the retroactive law is based upon the moral right of the class benefitted to the remedy given,” and the terms of the release signed by the Commonwealth receiver, which recognized that “public policy” and “moral obligations” would justify the allocation of additional state funds to the depositors.

Rather than dispute this the court elected to emphasize the plaintiff’s argument that the open class created by L.B. 272A was more theoretical than fact:

For this to happen, a series of highly unlikely (if not impossible) events would have to occur. First, new industrials would have to be chartered. Second, they would have to become members of the NDIGC (or the only two industrials which presently exist would have to renounce their FDIC coverage and become members of the NDIGC), and the deposits of these industrials would have to be guaranteed by the NDIGC. Third, those industrials would have to go into receivership or bankruptcy. And, fourth, the depositors of those institutions would have to suffer deposit losses.

The court stressed that “[i]n determining whether a class is closed, this court is not limited to the face of the legislation, but may consider the act’s application.” It then stated that “[i]f the prospect is merely theoretical, and not probable, the act is special legislation. The conditions of entry into the class must not only be possible, but reasonably probable of attainment.” To hold otherwise, the court concluded, “would be to accept artful draftsmanship over reality.”

The court’s analysis is compelling, if (as always) the cases cited by the court support the propositions for which they are employed, and if the assumption is that the ban on special or local legislation is, or should be, strictly construed. Alas, neither proves to be the case.

229. See infra text accompanying notes 581-91.
232. Id. at 717-18, 467 N.W.2d at 849.
233. Id. at 718, 467 N.W.2d at 849.
City of Scottsbluff, which the court employs to establish the need for "future growth or development," provided the classic example of a classification closed in both theory and fact. The operative legislation, L.B. 1293, keyed its division on the number of inhabitants that the cities in question had "according to the 1960 federal census."\textsuperscript{234} The court, citing prior case law regarding the "freezing of the class," stated that "[t]he law is unmistakably clear that a statute classifying cities for legislative purposes in such a way that no other city may ever be added to the class violates the constitutional provision forbidding special laws where general laws can be applicable."\textsuperscript{235} That is, the "evil" in question was the use of a date to define the absolute limits of the class. That, of course, was not the situation created by L.B. 272A. That measure was prospective, in the sense that the date was selected as a starting point for entry into the class, rather than an outer limit of eligibility. The court, perhaps sensing this, argued that it was entitled to look beyond the actual terms of the act and consider its "application."\textsuperscript{236} Two Nebraska cases were cited as "primary" support for this approach, Axberg v. City of Lincoln\textsuperscript{237} and Gossman v. State Employees Retirement System,\textsuperscript{238} with a third, State ex rel. Wheeler v. Stuht,\textsuperscript{239} included in a supporting "string cite" that also directed one to decisions in New Jersey and Oregon.\textsuperscript{240}

The underlying issue in Axberg tracked that in City of Scottsbluff; the classification dealt with cities of the first class and limited its operation to those that had "heretofore" adopted a home rule charter.\textsuperscript{241} As the court observed:

\begin{quote}
[i]t is apparent on the face of it that its operation is not uniform upon the designated class. Under its terms the city of Lincoln is not obliged to pay firemen's pensions while the city of Grand Island is required to do so, even though they are both cities of the first class.\textsuperscript{242}
\end{quote}

That, the court concluded, violated the constitutional ban on special legislation because "[t]here is no sufficient reason advanced why one city of the first class should be exempted from the special obligations and burdens of the firemen's pension law, while others in the same

\begin{footnotes}
\item 235. City of Scottsbluff v. Tiemann, 185 Neb. 256, 261, 175 N.W.2d 74, 79 (1970)(citing Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942)).
\item 237. 141 Neb. 55, 2 N.W.2d 613 (1942).
\item 238. 177 Neb. 326, 129 N.W.2d 97 (1964).
\item 239. 52 Neb. 209, 71 N.W. 941 (1897).
\item 242. Axberg v. City of Lincoln, 141 Neb. 55, 62, 2 N.W.2d 613, 616 (1942).
\end{footnotes}
class are required to submit to such obligations and burdens."  

The "application" problem in Axberg then was not that the class was "permanently closed" so much as it was that it was closed to other cities of the same type for no good reason. This was consistent with a number of prior decisions within which the court balanced the nature and scope of the classification with its articulated purposes. In Gallo-
way v. Wolfe, for example, the court struck a measure that treated various cities differently for the purposes of promoting or banning public dancing on Sundays. The court stressed that the measure did "not relate to the government of municipalities, and makes no attempt to classify them as such; it has to do only with the conduct of individuals and divides them into two classes: First, those who live in metropolitan cities and, second, those who live outside such cities." The classification failed because "[t]he same vices and immoralities may be present at a barn dance in the country as in a gilded palace in a metropolitan city." 

That did not mean, however, that an otherwise "closed" class must fail. Less than a month after it decided Galloway the court examined a legislative scheme treating western counties differently from those in the east. The question posed in the case, McFadden v. Denter, was whether the legislature could authorize individuals in the west to erect automobile crossings across public highways. The court sustained the measure, stressing that "[l]egislation applicable alone to the western area of the state is not forbidden by the Constitution." There were, the court stressed, substantial differences between the two regions. The classification was clearly closed, and permanently so; as one individual observed, "it is difficult to conceive of eastern Nebraska becoming a part of western Nebraska." Nevertheless, the distinction was a valid one, precisely because there are and should be limits to the extent to which it is appropriate to condemn "perma-

This becomes even clearer in Gossman, which dealt with various challenges to the then newly enacted State Employees Retirement Act. The court examined, and rejected, a variety of special legisla-

cion challenges to the act in a discussion emphasizing repeatedly that

243. Id. at 64, 2 N.W.2d at 617.
244. 117 Neb. 824, 223 N.W. 1 (1929).
245. Id. at 827, 223 N.W. at 2.
246. Id. at 829, 223 N.W. at 3.
247. 118 Neb. 38, 223 N.W. 462 (1929).
248. Id. at 41, 223 N.W. at 463.
249. Charles B. Nutting, Special Legislation in Nebraska, 17 NEB. L. BULL. 332, 339 n.56 (1938).
250. L.B. 512, 1963 Neb. Laws 532 (codified at NEB. REV. STAT. §§ 84-1301 to 84-1331 (1963)).
"[a]ll that is required is that the classifications and the requirements thereunder must have some reasonable relation to the purposes and objectives of the Act."251 The court conceded that "[i]t is obvious that any retirement act is 'special' legislation in the sense that it is designed for a particular group of people and for a special purpose."252 That was so, however, not because such acts created "permanently closed classes," but because their "purposes cannot be accomplished by a general law applying to all people."253 In particular, the court rejected the challenge to one section of the act, a fund "earmarked for the payment to a closed class of which [plaintiff] is not a member" and, presumably, of which he and others could never become a member, a "prior service benefits" fund earmarked for all employees who met three conditions: continuous service since December 1, 1958; birth prior to December 1, 1923; and not having attained the age of sixty when their continuous employment began.254

It was at this juncture that the court addressed "substance" over "form," but in a manner entirely at odds with the proposition articulated in Haman. The court stressed that "[w]ide discretion is vested in the Legislature as to the conditions of public employment and as to the requirements, classifications[,] contributions to, and benefits conferred by a retirement act."255 The one percent assessment to which the plaintiff objected, while levied against all employees, was to be paid to one particular class that the plaintiff, and others like him, could never enter. Nevertheless, as the court stressed:

Plaintiff's argument, if carried to its logical conclusion, would result in the declaration of the invalidity of any retirement act unless the benefits as to all members were exactly proportionate to the contributions. Such a position does not recognize the reasonable purposes and objectives of a retirement act. It does not recognize that the State here is acting in its capacity to set the required conditions of employment. Plaintiff's contention would render the accomplishment of the legitimate purposes of a retirement act impossible and completely impractical. The recognition and payment of prior service benefits under all retirement acts goes to the core of the economic and employment policy purposes of a retirement act, the inducement to remain in employment, the retention of trained personnel, and an inducement for the older employees to make way for younger employees.256

The final Nebraska case in the sequence involved a challenge to the constitutionality of an 1897 act that changed the terms and conditions under which a city of the "metropolitan" class operated and, in

252. Id. at 336, 129 N.W.2d at 104.
253. Id.
256. Id. at 337-38, 129 N.W.2d at 104-05.
particular, the election of members of the city council. The act was questioned by individuals who contended that an 1887 measure on the same subject controlled, and that as a result of an election held pursuant to the 1897 act "their offices were being and had been unlawfully invaded and usurped, the powers and duties performed, and the emoluments and privileges thereof enjoyed, by the respondents."257 The court held that a portion of the act, which would have shortened the term of an already elected police judge, was invalid. The court then indicated, as a threshold to its discussion of the special legislation challenge, that the following approach applied:

In an examination into the character of an act of the legislature, to ascertain whether it is general or otherwise, the determination of the question must depend on the substance of the act, not its form. That the act contains expressions which might stamp it as general will not give it such character. Nor will expressions or terms which might lead to a belief that it is special make it so. The substance alone must give character to the act.258

The court rejected the claim that the measure was designed and did in effect operate only on the city of Omaha, stressing what has become the core rule regarding classification of cities:

[i]f, by a consideration of a law classifying cities on a basis of population, it be determined that another city or other cities may at a future time, without the aid of additional legislation, enter and become a member or members of this particular class, the classification is a general one and so is the law establishing it.259

The full implications of this become even more evident when one examines Republic Investment Fund I v. Town of Surprise,260 an Arizona case cited in support of the proposition that "[t]he conditions of entry into the class must not only be possible, but reasonably probable of attainment."261 Republic Investment Fund seems, in many respects, to be a perfect case for the Haman court. The Arizona court began its discussion by making it clear that "[a] statute may withstand equal protection review, yet still be found unconstitutional under the special/local law provision."262 The special legislation standard is "different and heightened . . . because the two provisions were promulgated to address different evils."263 Equal protection bans discrimination against a person or class; special legislation bans unreasonable discrimination that favors "a person or class by granting

258. Id. at 222, 71 N.W. at 945.
259. Id. at 223, 71 N.W. at 945.
263. Id. at 1257.
them a special or exclusive immunity, privilege, or franchise.' "264 Republic Investment Fund, accordingly, offers both a heightened scrutiny standard and a compelling rationale for that choice, the need to combat the propensity of a legislature to favor a chosen few.

Significantly, it is the "elasticity" element that provides the "heightened" scrutiny in a two-step inquiry that first asks "whether the law has a rational relationship to a legitimate legislative objective." "265 Under this initial step, the court employs the traditional approach: a statutory classification will be reasonable, and upheld, "if it has any conceivable rational basis to further a legitimate governmental interest." 266 That is, the court "will uphold [the measure] if we perceive any set of facts which rationally justify it." 267 These statements, admittedly, appear in the portion of this opinion discussing an equal protection claim, but the court makes it clear when it turns to the special legislation issue, "[a]s discussed earlier, the classifications in the statute have a rational basis in furthering the legitimate state objective of encouraging continued investment in the operation of racing meetings." 268

The second step, the court explains, is to see "whether the class is elastic, allowing members to move into and out of the class." 269 The court indicates that "[a] statute is special or local if it is worded such that its scope is limited to a particular case and it 'looks to no broader application in the future.' "270 In deciding if the act is special the court will, as Haman indicates, consider actual probabilities; "[w]here the prospect is only theoretical, and not probable, we will find the act special or local in nature." 271 The requirement that the prospect for expansion be "probable" rather than merely "theoretical" is not, however, absolute. The court made it clear that "[a] law may be general and still apply to only one entity, if that entity is the only member of a legitimate class." 272 Elasticity, then, means only that a class must be "open" in the sense that it "admit[s] entry of additional persons, places, or things attaining the requisite characteristics, [and] also . . . enable[s] others to exit the statute's coverage when they no longer

264. Id. at 1256 (quoting Arizona Downs v. Arizona Horsemen's Found., 637 P.2d 1053, 1060 (Ariz. 1981)).
265. Id. at 1257 (quoting Petitioners for Deannexation v. City of Goodyear, 773 P.2d 1028, 1031 (Ariz. Ct. App. 1989)).
267. Id. at 1059 (emphasis in original).
268. Id. at 1061.
270. Id. at 1258 (quoting Arizona Downs v. Arizona Horsemen's Found., 637 P.2d 1053, 1061 (Ariz. 1981)).
271. Id. at 1259.
272. Id. at 1258. As the court observes, the logical corollary to this is that "a law may be special even if it applies to more than one entity when it applies to less than the entire class." Id. at 1258 n.4.
have those characteristics.”273 The emphasis, quite clearly, is on the characteristics and the extent to which they provide a valid basis for drawing the distinction.

The fact that a given class is “permanently closed” does not, properly understood, render the classification void if in reality the class consists of all individuals or entities sharing a characteristic that the legislature can properly recognize. This becomes extraordinarily clear when one examines the manner in which the Arizona court has applied the rule. The elasticity requirement, for example, originated in a case in which the court stressed that the threshold question was in fact whether classification of cities could be accomplished by use of population figures.274 The court held they could, provided that “other cities may, as they attain the requisite conditions, come within the classification and within the operation of the statute.”275 The issue is often one of focus. In one case the court could have characterized the classification as either horse racing in general or access to particular dates for the purposes of holding racing meets. It chose to define the class as horse racing, and sustained the statute even though it allowed the state racing commission to “permanently close” certain dates to other members of the wider class; “[t]he terms of the statute apply equally to all types of racing and to all members of each class.”276

The same sort of calculus is undertaken in New Jersey, a state that supplied two additional cases cited by the Haman court, Mason v. City of Paterson277 and In re Freygang.278 Mason involved a population classification scheme that had been consistently manipulated by the legislature so that only the City of Paterson would qualify for the “benefits” conferred. The court stressed that “[i]n form the statutes under consideration are general in nature; however, the effect of the various amendments has demonstrated that the legislative purpose was to create a special form of government for the City of Paterson.”279 The court did not, however, invalidate the measure because Paterson was the only city that qualified. It struck the classification, rather, because “satisfactory reasons must be found to exclude it from the prohibition against local laws.”280 The court found no “logical reasons” for the mechanics of the act or “any explanations” as to why other cities of the same size should not fall within its operation, rendering the classification “illusory.”

273. Id.
275. Id. at 590.
280. Id.
In Freygang the focus was on a classification that limited its operation to certain cities where rent control had "heretofore" been in effect. This, using the logic of Axberg and City of Scottsbluff, should have rendered the class constitutionally infirm; the use of the limiting term "heretofore" made the class "permanently" closed. The New Jersey court did not agree, however, even as it stressed that it would "look to [the statute's] substance and necessary operation, as well as to its form and phraseology." The court stressed that "[t]he mere fact that similar exigencies may confront other counties at some point in the future does not limit the ability of the Legislature to address the problems presently confronting Atlantic County." This is possible in New Jersey, interestingly enough, because of both a more realistic reading of the nature of the special legislation prohibition and the court's determination that it will employ the same standard in equal protection and special legislation inquiries. The analysis is "similar" to that "used to determine whether a person is afforded equal protection under the U.S. Constitution," with the court looking for "any rea-

282. Id. at 677.
283. Id. at 678.
287. Id. at 683.
son to justify the classification." This produces, accordingly, a willingness to look beyond the "face" of the legislation that assumes quite a different judicial gloss than the one put on in *Haman*. That is, rather than creating a reason to strike the measure, a court "searching for a conceivable rational basis for the enactment of legislation . . . is not limited to the stated purpose of the legislation, but should seek any conceivable rational basis." These decisions, drawn from jurisdictions that the *Haman* court consulted on this very issue, are not isolated phenomena. Classifications are generally upheld where "some substantial difference" is identified; in particular "acts relating to persons and corporations are usually sustained when attacked as special legislation." The fact that one individual or entity might benefit to the exclusion of another is not dispositive: "a law relating to particular persons or things as a class is said to be general; while a law relating to particular persons or things of a class is deemed special and private." This will be true even if the party excluded is treated in what might be termed an unfair manner, since "legislation which creates classifications with inequitable results is not unconstitutional if the distinctions have a rational basis." Moreover, while it is true as a general rule that "a legislative act that applies only to particular individuals or things of a class is special legislation," that does not necessarily mean that

290. 2 SUTHERLAND supra note 206, at § 40.04. The cases are listed at id. n.11.
291. Id. § 40.18. The author notes that "among one hundred and thirty cases read, the courts sustained one hundred and six acts and declared invalid twenty-four acts." Id. n.11.
292. Madison Metro. Sewerage Dist. v. Stein, 177 N.W. 2d 131, 137 (Wis. 1970)(quoting Johnson v. Milwaukee, 60 N.W. 270, 271 (Wis. 1894)). The Madison case is cited in *Haman* to support the proposition that legislation applying to "particular individuals" is "special." The reliance is clearly misplaced since the dispositive issue is not whether the classification is closed, in the sense that the *Haman* court dwells on, but rather whether it is "arbitrary." Id. at 137 (quoting John M. Winters, *Classification of Municipalities*, 57 NW. U. L. Rev. 279, 279 (1962)). As the Johnson court stressed, "[a]l cannot use with benefit powers which would be of great advantage to some. A law which should provide for one case only, in a proper case, should be held to be a general law." Johnson v. City of Milwaukee, 60 N.W. 270, 271 (Wis. 1894). It should be noted that the court articulated this position even as it recognized that one of the general rules regarding classification is "the classification must not be based on existing circumstances only and "must not be so constituted as to preclude addition to the numbers included within a class." Id. at 272.
the legislation is unconstitutional. Thus, while the *Jackson County v. Jackson Education Service District* court does state the rule for which the *Haman* court cites that case, the classification at issue, which was "comprised of the counties and taxing districts which entered into agreements before the effective date of the act," was valid. "The test does not depend upon the number of people or things within the scope of the law or whether it is equally applicable to all parts of the state. Rather, the test is whether the classification bears a rational relationship to the purpose of the act." Indeed, the argument in favor of an otherwise "closed" class becomes even more compelling when the predicate for the act is discharge of a moral obligation:

There is at least one fundamental and controlling reason why the act in question should not be condemned as unconstitutional, though special. The Legislature has the right, as we have stated, to recognize a moral claim. It is not, however, compelled to do so. And if it acknowledges any one particular claim as just and equitable, we do not think that the court has the right to say it must also recognize all other claims of a similar nature, and do so by passing a general law. The Legislature might deem one claim as just and equitable because of the particular, peculiar incidents connected therewith, while another similar claim, but somewhat different in its aspects, might not be considered such as would, in its judgment, demand compensation.

The inescapable conclusion is that most jurisdictions that have considered the question have sustained the power of a legislature to classify even where that classification is either closed or consists of an extraordinarily narrow universe of persons, places, or things. The true significance of all of this becomes apparent when one considers both the origins of the "permanent closed class" standard in Nebraska and the implications of what the court states in *Haman* for all future special legislation litigation in this state. Neither the propriety nor

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296. *Haman v. Marsh*, 237 Neb. 699, 715, 467 N.W.2d 836, 848 (1991)(quoting Etheridge v. Medical Center Hosps., 376 S.E.2d 525, 533 (Va. 1989)). Prior to the quoted passage the *Etheridge* court emphasized that "long ago, we held that "[l]aws may be made to apply to a class only, and that class may be in point of fact a small one, provided the classification itself be a reasonable and not an arbitrary one, and the law be made to apply to all of the persons belonging to the class without distinction." *Etheridge* v. Medical Center Hosps., 376 S.E.2d 525, 533 (Va. 1989)(quoting *Ex parte Settle*, 77 S.E. 496, 497 (Va. 1913)). It then rejected the notion that the court should "second guess the General Assembly's judgment and . . . determine the necessity for and reasonableness of the classification." *Id.* at 533 n.4.
the applicability of the "permanency" standard was questioned by any of the parties in Haman. Most of the case law seemed to imply that the permanency inquiry reflected settled understandings of the parameters of article III, section 18, as applied to all possible classifications. That section of the Constitution, which has been parsed as a general prohibition against "special legislation," is, however, more complex than the general treatment (in Haman and elsewhere) would lead one to believe. More importantly, the manner in which the doctrines used to apply article III, section 18 have evolved seems, on careful examination, to belie the actual scope of the prohibition and the original, contemporaneous understanding of its reach. This is especially true in the case of the permanency requirement, which seems to have evolved beyond the parameters for which it was designed and within which it could reasonably be expected to operate.298

C. "Permanently Closed Classes": Myths and Realities

Article III, section 18 states that "[t]he Legislature shall not pass local or special laws in any of the following cases," listing twenty-one specific prohibitions. It then provides that "[i]n all other cases where a general law can be made applicable, no special law shall be enacted." A reasonable reading of this section would seem to be that in certain, named instances "local" or "special" laws may never be passed. Thus, for example, the section states expressly that the legislature may not pass a "local" or "special" law for "[t]he protection of game or fish." This, on its face, would seem to indicate that a purely local, that is to say, geographically limited, game or fish measure could not withstand scrutiny.

The court recognized at an early juncture, however, that a strict reading of this provision would prevent the state from attaining many laudable objectives. Accordingly, in Bauer v. Game, Forestation & Parks Commission,299 it allowed the legislature to set up a game refuge in a specified area along the Platte River. The court conceded that "[t]he purpose of the law is simple, and clearly provides for a permanent closed season in this restricted area along the Platte river."300 The court decided, however, that the proper focus was not—as the


300. Id. at 440, 293 N.W. at 284.
constitutional language would seem to dictate—on the locality, or even perhaps on the types of game or fish to be found there. It was, rather, on the citizens who might wish to avail themselves of the "sporting" opportunities presented by the particular parcel of land. It indicated, accordingly, that "[a] statute is not special or local merely because it prohibits doing a thing in a certain locality. It is, notwithstanding this fact, a general law if it applies to all citizens of the state, and deals with a matter of general concern."

This is, of course, precisely the same sort of perspective-shifting process embraced by other jurisdictions, notably Arizona, which supplied one of the decisions on which the Haman author relied. Interestingly, the Haman court translated the Bauer holding into the general proposition that "[b]y definition, a legislative act is general, and not special, if it operates alike on all persons of a class or on persons who are brought within the relations and circumstances provided for and if the classification so adopted by the Legislature has a basis in reason and is not purely arbitrary." So far, so good; there is no particular reason to believe that L.B. 272A runs afoul of this standard. The "relations and circumstances provided for" were, in the words of that measure, those that meant that "holders of certificates of indebtedness which later became protected companies were paid in full if their certificates of indebtedness matured before the industrial company filed bankruptcy, but those whose certificates of indebtedness happened to mature afterwards received only partial payment." That is, by virtue of the actions taken by the state, certain individuals were harmed, a harm the state had no legal obligation to redress but believed itself morally obligated to correct. That, it seemed, was neither unreasonable nor purely arbitrary.

Unfortunately, the court has also in recent years consistently seemed to imply that any legislative act creating a "permanently closed class" offends this provision. In Haman the court cited City of Scottsbluff for this proposition, quoting the earlier holding in State ex rel. Conkling v. Kelso. The interesting issue is posed by close examination of the "almost unbroken line of decisions," since it appears that the extension of the doctrine beyond the particular type of classi-

301. Id. at 442, 293 N.W. at 285.
302. Haman v. Marsh, 237 Neb. 699, 709, 467 N.W.2d 836, 844 (1991)(citing Bauer v. State Game, Forestation and Parks Comm'n, 138 Neb. 436, 293 N.W. 282 (1940)). The actual language employed in Bauer was somewhat different: "An act is general, and not special or local, if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided for, if the classification so adopted by the legislature has a basis in reason, and is not purely arbitrary." Bauer v. Game, Forestation & Parks Comm'n, 138 Neb. 436, 441, 293 N.W. 282, 285 (1940).
304. 92 Neb. 628, 139 N.W. 226 (1912).
fication involved, cities (or at least the use of a population figure as a surrogate for the characteristic of a given "class" of cities), is unwarranted. Moreover, there is a second "line of cases," of which Bauer is a part, that points toward a different set of analytic considerations when the focus is not on political subdivisions and population.

Both City of Scottsbluff and Kelso dealt with the same problem, and a careful examination of Kelso makes it clear that the aspect of the classification rules developed in those cases was intended to be narrow and situation specific. The passage from Kelso quoted in City of Scottsbluff, for example, actually begins somewhat earlier:

There can be no just objection to the classification of county seats if such classification is general and could be applied to all counties in the state, should the county seat remain unchanged for a specific number of years. This principle is recognized in [numerous cases]. . . . But in State v. Scott . . . a different rule is applied where the limitation closes the door to any further admission to the class, and the act is held to be the equivalent of naming the county seats to which the proviso is to be applied, and can never apply to others, and to that extent it is both local and special legislation.305

Two things are striking here. One is all of the "ands," which seem to impose a "conjunctive" rather than "disjunctive" inquiry in order for the measure to offend the constitutional mandate. The second is the reality presented by State v. Scott,306 the case that provides the impetus for the doctrine articulated in Kelso. Scott is a decision presenting a fact pattern strikingly similar to that in City of Scottsbluff. The legislation was limited in operation to "counties having over 50,000 inhabitants according to the census of 1900." The court took "judicial notice" of the fact that as a result of this limitation only two counties qualified, Douglas and Lancaster. This meant that "the act might as well have stated in express terms" what it "plainly and inevitably" implied.307 The court, even as it acknowledged that the legislation made sense, then identified the constitutional flaw:

The object of the law may be wise, and the reform sought to be accomplished may be salutary. It may be that the heavier burden placed upon the roads and bridges of the counties named by reason of the greater density of population and consequently increased amount of travel and intercourse carried on upon the public highways renders it necessary that a skilled officer shall have the general charge and supervision of road work and of the selection for, and the construction and repair of, bridges. But this end is as necessary to be attained in all counties which may in the future reach the population prescribed by this act as in those which are now in the class.308

The various cases relied upon by the court in Kelso and Scott confirm this sense of what the true "evil" of "permanency" is. In one early classification case, for example, the court observed that:

305. Id. at 631-32, 139 N.W. at 227 (1912)(emphasis added)(citations omitted).
306. 70 Neb. 685, 100 N.W. 812 (1904).
307. Id. at 686, 100 N.W. at 813.
308. Id. at 686-87, 100 N.W. at 813.
[If an act is to be deemed inimical to the provisions of the constitution above referred to, simply because, in point of fact, its operation is confined to only one city, then it would follow that our only city of the first class is utterly without legal corporate existence—a state of things which could not have been intended by the framers of the constitution, prominent among whom were several representatives of that city.309

The court subsequently observed, in a case where the party challenging the measure stressed that "it was not within the range of human possibilities that during his term of office there would be anybody else to whom [the act] would apply" that "[t]here is nothing in the bill to indicate that the legislature singled out Douglas county specially."310 It "so happen[ed]" that the measure applied in only one county, and the principle articulated in State ex rel. Wheeler v. Stuht did not apply; "[w]hile it is true that the probabilities are against any other county reaching this class during the term of office now being served by respondent, it is not impossible, and there is nothing whatsoever in the bill to prevent such a county from entering this class."311

The true meaning and implication of this line of cases becomes apparent when it is compared to a second series of cases which recognize that "if a law is general and uniform throughout the state, operating alike on all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation."312 Bauer and McFadden, which I have already discussed, are cases decided within this line, which recognizes that "while it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified."313 That rule, which tracks virtually verbatim the one invoked in Haman, was articulated in a decision in which the court explored whether the legislature could exempt irrigation companies from a duty to keep and repair public bridges across their ditches. The court invalidated the measure, but not because it was beyond the power of the legislature to enact such legislation in appropriate circumstances. The inquiry was, rather, "[u]pon what ground can this classification be justified?"314 The court stressed that irrigation company "ditches are not, by the section in question, segre-

311. Id. at 687, 85 N.W. at 958-59. This opinion was issued on rehearing and reversed the original decision of the court that, with no discussion, invalidated the act on the authority of Stuht. State ex rel. Douglas County v. Frank, 60 Neb. 327, 336, 83 N.W. 74, 76 (1900).
313. State ex rel. Dawson County v. Farmers' & Merchants' Irrigation Co., 59 Neb. 1, 3-4, 80 N.W. 52, 53 (1899).
314. Id. at 5, 80 N.W. at 53.
gated from other private ditches on account of any peculiar characteristics which they possess."³¹⁵ The flaw, then, was that the "substantial difference" had not been identified, not that such a difference could not justify special treatment.

That was not, however, the situation in two other cases, one decided before and one after Dawson County. In the first, Livingston Loan & Building Ass'n v. Drummond,³¹⁶ the focus was on a claim that a ten percent rate of interest was usurious. The special legislation aspect of the case was the contention that the statutes authorizing the creation of building and loan associations gave that particular group of corporations special treatment by authorizing interest up to a rate of twelve percent. The court recognized that "[t]he legislature may not arbitrarily, and without any possible reason, create a class to be affected by legislation, where the result would be an infringement upon the constitutional prohibition."³¹⁷ It also conceded that "[t]his statute does, in terms, to a certain extent, exempt such cases from the operation of the general laws relating to interest."³¹⁸ But it was not special legislation:

We must take notice of the fact that, rightly or wrongly, for many years, many states, and England as well, have pursued a policy of encouraging the operation of such associations, as facilitating the building of homes for the people; and the public policy thereby involved would justify the legislature, in its wisdom, in classifying loans for such purpose, and made in such ways, as a group by themselves, and subject to different restrictions and privileges than those applying to loans generally.³¹⁹

Twenty-six years later the question was whether the legislature could authorize the Board of Regents to manufacture hog cholera serum and deliver it to the state veterinarian and to farmers and swine-growers.³²⁰ The act was challenged in Fisher v. Board of Regents as special legislation, under the theory that "licensed veterinarians, for instance, who buy, sell and use hog-cholera serum for profit are denied the benefits and privileges inuring under the act to the special class limited to 'farmers and swine-growers.'"³²¹ The court, in no uncertain terms, rejected the challenge, stressing that the legislation had been enacted at a time of "public calamity" and that "[t]hese producers were named in the act because they were at the source of the animal food supply, where the remedy for hog-cholera could be applied."³²² The class was, from the perspective of "farmers and swine-

³¹⁵. Id.
³¹⁶. 49 Neb. 200, 202, 68 N.W. 375, 376 (1896).
³¹⁷. Id. at 205, 68 N.W. at 377.
³¹⁸. Id. at 206, 68 N.W. at 377.
³¹⁹. Id. at 205-06, 68 N.W. at 377.
³²¹. 108 Neb. 666, 669-70, 189 N.W. 161, 163 (1922).
³²². Id. at 670, 189 N.W. at 163.
growers," open; all individuals who shared those characteristics could enter. It was, however, in a very real sense "permanently closed" to all others, many of whom, like veterinarians, had an arguably legitimate right to enter. Nevertheless, "[t]here is no convincing reason for condemning 'farmers and swine-growers' as a classification for the purposes of legislation to protect the food supply of pork . . . ."323

More tellingly, in light of the dispute that emerged in Haman about the propriety of using public funds for the benefit of private actors, this was within the "taxation powers of the state."324 That, the court stressed, had been settled by State ex rel. Hall County Farm Bureau v. Miller, a case that recognized the power of the legislature to compel a county board to appropriate funds to the county farm bureau, a permissible expenditure of "[a] small portion of the public funds raised by taxation in the ordinary manner . . . devoted to a branch of education affecting the chief industry of the state."325

The doctrinal origins of the "permanently closed class" rule are therefore more complicated than either Haman or City of Scottsbluff might lead one to believe. The problem is not, in the narrow sense, that the class is limited to an identifiable set of cities, in most of the cases, or individuals, as in Haman. It is, rather, that the presumed justifications for the classification are of precisely the sort that reveal an intent to invidiously discriminate, rather than to allow all who share the characteristic to benefit. The constitutional language does not, after all, prohibit all classifications, only those either expressly listed or those that are created by "special" laws when a "general" measure would attain the same objective. Indeed, the very fact that so many specific bans are listed bolsters the impression that the evil the framers had in mind is not posed by the simple act of classifying, without more.

In short, the evil is not "permanency." It is, rather, the articulation of a class whose justifications are belied by its realities. The constitution provides, and the court has acknowledged, that the legislature may enact "local" or "special" measures when a general law may not be made applicable. The class created must be reasonable, may not be arbitrary, and should bear a "substantial" relationship to the purposes for which it was created. In the specific context of cities, the issue becomes the extent to which population, and population alone, can properly serve as a surrogate for articulation by the legislature of the specific conditions that justify disparate treatment. A permanently closed class is suspect, and such a doctrine is needed, accordingly, precisely because it identifies instances in which the legislature has arbitrarily selected its beneficiaries, rather than because it does not allow

323. Id.
324. Id.
some future individual or entity to enter. Such distinctions are proper, in turn, because they are founded upon "reasonable differences" and a "substantial relationship" to the objectives sought.

It therefore seems appropriate for the state to, for example, create a series of special programs or entitlements for discreet "classes" of individuals. Measures of that sort are "closed classes" in the sense that not all citizens may enter them, as was the case in Fisher, or in the narrower sense that a disability may exist but not be serious enough to warrant inclusion. A class could in turn be "permanently" closed in the sense that the legislation authorizes a one-time only benefit for the select few who qualify. No one, I suspect, would seriously argue that such classifications violate article III, section 18. They serve a public purpose, and the characteristics identified are both real and realistic.

This is all the more intriguing since the deference granted to legislative classification decisions is, at least in theory, substantial. For example, a classification will not fail even if it simply reflects an exercise of pure discretion. Thus, in Otto v. Hahn, the court rejected a constitutional challenge to the exclusion of farm laborers from the Workmen's Compensation Act, observing that "[i]t becomes apparent that farm laborers were excluded from the act not because farming is non-hazardous but because the Legislature chose not to extend the coverage of the act to that class for a possibly political or social reason."
The choice was "rational." The same type of distinction arose in Ex parte Caldwell, which recognized the power to classify barbers as common laborers, and in State v. Murray, which recognized the authority of the legislature to impose greater penalties on barbers for conducting their business on Sundays than those placed on other common laborers. In Caldwell the "wisdom" of the classification was not a matter for the court, provided there was a "sensible distinction." In Murray, the statute applied evenly to all members of the class and was "reasonable," even though it singled out that class for a heavier penalty.

The court has also stressed that a classification will not be deemed suspect even though it offers substantial benefits to private individuals:

Statutes which are reasonably designed to protect the health, morals, and general welfare do not violate the Constitution where they operate uniformly on all within a class which is reasonable. This is so even if a statute grants special or exclusive privileges where the primary purpose of the grant is not

327. Id. at 118, 306 N.W.2d at 590.
328. 82 Neb. 544, 118 N.W. 133 (1908).
329. 104 Neb. 51, 175 N.W. 666 (1919).
the private benefit of the grantees but the promotion of the public interest.\textsuperscript{332} This is of considerable importance, since the evil that supposedly obviated any need to discuss the wider public purpose articulated in L.B. 272A was the fact that public funds were given to private individuals. That was the animating force of the court's decision in \textit{Weaver}, the decision quoted for the proposition that L.B. 272A was an impermissible charitable act, and it was clearly a significant factor in the court's mind. If, however, \textit{incidental} private benefits are permissible, it becomes quite clear that the heart of the matter in \textit{Haman} is the refusal of the court to credit the wider purposes articulated for L.B. 272A, a refusal that requires heightened scrutiny since at the rational basis level \textit{any} public policy rationale, no matter how ephemeral, tends to be accepted.

The legislature clearly articulated "some reason of public policy" in L.B. 272A. It was also clear that the act's identification of depositors protected, and the certificates of indebtedness to be redeemed, were predicated on a "substantial difference of situation or circumstances," differences that would "naturally suggest the justice" of what the legislature sought to accomplish. The fact that the authors of L.B. 272A drafted that measure as they did suggests the need to ask why, and there are only two possible answers. The first is that the legislature was establishing a general principle with a particular application: promises, either made on behalf of the people of this state or impelled by them, are to be kept, and the failure to do so constitutes precisely the sort of grave public harm toward which appropriate applications of the state police power must be directed. The second answer is that the authors of L.B. 272A were well aware of the legal principles the \textit{Haman} court eventually explored, and deliberately crafted a measure that, while limited in its immediate intent to the compensation of specific depositors, nevertheless created open classifications consistent with the command of article III, section 18.

The express and incontrovertible terms of L.B. 272A suggest that these are the only possible explanations. The first characterization clearly ascribes to the legislature a greater nobility of purpose than the second, which attributes to the drafters the narrow objective of crafting a measure that would withstand judicial scrutiny. The court seemed to concede much of this when it expressed its reluctance to "accept artful draftsmanship over reality."\textsuperscript{333} If the court truly means this, however, and if "reasonable probability of attainment" is now the standard by which classifications will be tested, the special legislation landscape in Nebraska has changed dramatically since the guiding principle to date had in fact been "artful" draftsmanship. For exam-

ple, the simple articulation of a number as a predicate for treating cities differently will no longer suffice. Ogallala may have the theoretical potential to reach the population level required for primary or metropolitan city status, but it is doubtful that anyone could argue, or would even be willing to suggest with a straight face, that this is more than "merely theoretical." That means that every special benefit predicated on a specific population figure must be justified by the detailed articulation of a "reasonable and substantial" basis.

It also means that the validity of the classification must be continuously tested, given the legislature's propensity to adjust population thresholds on a routine basis, a practice the court apparently condones. If, for example, the conditions recognized and benefits conferred by the label "metropolitan" inhere to a specific population level, then there is no constitutionally sound reason to deny that the conditions exist and benefits are appropriate when a city eventually reaches that level. Yet that is precisely what happens each time, for example, that Lincoln has reached or is in danger of attaining that status. In 1947, for example, it appeared that Lincoln had reached the magic threshold and was on the brink of entering the metropolitan class. The legislature, at the instigation of the Lancaster County delegation, passed L.B. 138, a measure that raised the population levels required to "go metropolitan." The motivation, apparently, was the belief "that Lincoln would have been adversely affected by certain 'general laws' controlling a metropolitan utilities district, a system of municipal courts, a municipal university and special sewage and drainage districts."334 That action, as the same observer stressed, ran counter to the growth principle articulated in Stuht and was an express rejection of the "opportunity to prove the validity of such extensive and arbitrary classification."335

In theory, and perhaps in fact, L.B. 138 violated the constitution. Certainly there is little doubt that the prior decisions of the court, coupled with Haman, would dictate just such a result. In Galloway, for example, the court stated "[t]rue, it may be that in 50 or 100 years one or more cities may have a population sufficient to qualify them as metropolitan, but the possibility, except perhaps the city of Lincoln, is so remote as to exclude it from consideration."336 The Haman holding and rationale, while in theory compatible with prior decisions, actually call into question the results consistently reached in them. As a result, the validity of the entire scheme of classifying by population, and population alone, is questionable, as is the legitimacy of allowing the legislature to periodically adjust the thresholds upward. Of course, whether this was what the Haman court intended, and more to the

334. A.C. Breckenridge, supra note 298, at 573.
335. Id. at 572.
point, whether the court will flinch or retreat if the argument is advanced in any context other than that of L.B. 272A, are quite different and potentially fascinating matters altogether.

Finally, if, as we are led to believe, words have important and specific meanings, it is not readily apparent what those meanings might be in the wake of *Haman* when one invokes the "narrower" special legislation test. Just what does it mean to state that the test is now one of a "reasonable and substantial relationship"? Does it, for example, mean that the legislative purpose must be "reasonable" and that the relationship between purpose expressed and means employed be "substantial"? Or must both the purpose and the relationship be "substantial"? These are not idle questions, given the manner in which other states handle such inquiries. As indicated, Virginia and Arizona test the objective at the lowest level of scrutiny, looking simply for "any" possible justification. They are also far from inconsequential inquiries given traditional understandings of intermediate scrutiny, a test that postulates the need for an "important" interest and "substantial" relationship.

Then again, should we care? This is, after all, the same court, albeit not (with one exception) the same cast of judges, that once observed:

Refined analysis and simplistic logic when applied to the practical impact of a particular classification produces many times an appearance of inequality and discrimination. This is especially true close to the borderlines. But the sharpness of the lines drawn does not create an irrationality of classification or an invidious discrimination. This is particularly true when the sword of legislative policy deals with broad problems of economics and social welfare.337

*Haman*, read strictly, would inevitably tend to blunt the legislative sword, rendering any hope of sustaining anything other than the sharpest classifications illusory. That approach may well comport with an ultra-strict reading of the applicable constitutional provisions and a refined sense of the court's own obligations as the ultimate arbiter of social change. Whether, in this imperfect world, either the reading or role are constitutionally proper, much less realistic or workable, is another matter entirely.

VI. STATING THE RULES: MORAL OBLIGATIONS AND THE MORAL SOCIETY

"Did you say moral or legal?" said the Chesire Precedent.

"I said moral," replied the Unicameral; "and I wish you wouldn't keep appearing and vanishing so suddenly; you make one quite giddy."

"All right," said the Precedent; and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.

"Well! I've often seen a precedent without a rationale," thought the Unicameral; "but a rationale without a precedent! It's the most curious thing I ever saw in all my life!"338

Much of Haman seems, like the Chesire Cat, to be an exercise in now you see him, now you don't, and you never quite know if he's all there. This is a rather interesting device if the objective is to amuse or confuse. It is less helpful if, as one would suppose to be the case with the court, the goal is to offer a full, carefully reasoned justification for and explanation of the result that is reached.

It is difficult to escape the eerie feeling that something is missing in Haman, that like the Chesire Cat the decision is often at best a disembodied judicial grin. This is especially evident in the passage that concludes the court's discussion of moral obligation, a place where "[w]e reiterate the words of this court from 60 years ago: 'Clearly it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution.'"339 Weaver v. Koehn, the case from which the court quotes, was in fact one of the four decisions used by the plaintiff to bolster her contention that "[o]n every occasion when the issue has been presented to it, this Court has held that retroactive legislation intended to compensate private individuals is unconstitutional. The rationale has varied from case to case, but the result has always been the same."340

The parties in Haman waged a mighty struggle over the actual meaning and current validity of Weaver, an opinion that, as the court conceded, constituted:

[a] holding that the appropriation of money by the state to reimburse depositors for losses sustained by them in failed banks clearly appears to be the taking of money belonging to one class to pay the claims of another class, and that is a violation of the due process provisions of the federal and state Constitutions.341

The Haman opinion, viewed dispassionately, seemed to indicate that any arguments about Weaver, and the due process aspects of the case, were beside the point. Nevertheless, as we have already seen, appearance and reality are often two different things in Haman. The "state credit" element of the decision, for example, did not in fact comprise one of the plaintiff’s original claims, in spite of the court's characteri-

338. ALICE, supra note 1, at 90 (Ch. VI: Pig and Pepper).
zation of it as such. The court’s elevation of the credit discussion to an independent ground for its decision reflected its agenda rather than that of the parties before it.342 In turn, the court’s recounting of the plaintiff’s first argument demonstrates that the due process elements of her position before the court were of considerable importance, informing and animating much of the discussion of why she believed L.B. 272A was special legislation.343

To those reading the briefs, Weaver, substantive due process, and the corollary issue of who determines Nebraska’s public policies seemed to be of the utmost importance. The truth of this proposition is bolstered, rather than weakened, by the court’s resort to Weaver. If, as the court asserts, L.B. 272A was enacted only for the benefit of the depositors in the three institutions, a constitutionally impermissible "permanently closed class," legislative motive is beside the point. A class that is "permanently closed" is constitutionally infirm regardless of whether it in fact bears a "reasonable and substantial relationship" to the objectives the legislature sought to achieve. Of what possible consequence is it, then, that sixty years ago the state was not an eleemosynary institution, vis-a-vis the supervision of banking? Moreover, if, as the court would also have us believe, "no further discussion of either the plaintiff’s or the defendant’s position on constitutionality is necessary,"344 how is it that the court deems it either necessary or appropriate to quote from the case that forms the centerpiece of those positions? The court’s recourse to Weaver, and its parenthetical explanation of this sixty year old precedent, only whet our appetite.

The explanation, I suspect, lies in a fuller examination of the manner in which the court had treated moral obligation and retroactive legislation in the past. That process, as we will now see, both exponentially expands the analytic universe and sheds important light on the actual meaning of the Weaver decision. It also provides us with an important key to the mindset that animates the result in Haman, conjuring up images of an era and a judicial philosophy that we had, apparently erroneously, previously consigned to the dusty pages of history.

A. Wakeley: When Is a “Rule” Really a Rule?

The analysis begins with a return to Wakeley, a decision that, as we have already seen in Section IV-B of this Article, is both an extraordinarily important link in the Haman court’s analytic chain and one

342. See supra text accompanying notes 96-98.
344. Id. at 723, 467 N.W.2d at 852.
whose reality is quite different from the impression conveyed by the court. This becomes even more evident when one examines the cases cited on the issue of moral obligation in Wakeley itself. In Butte Miners' Union v. City of Butte, the court recognized the ability of a state to subject its political subdivisions to liability for mob violence. In that instance the operative state statute specified that "[e]very city or town is responsible for injuries to real or personal property within its corporate limits done or caused by mobs or riots." The purpose of the measure, the court noted, was to create municipal liability and tend to instill in the mind of every person liable to contribute to the public expense a will to discourage violence and to stimulate effort to preserve the public safety." That, the court stressed, was a valid legislative recognition of the traditional rule that "'a civil subdivision, intrusted with the duty of protecting property in its midst and with police power to discharge the function, may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation.'" It is possible, I imagine, to treat the phrase "instill in the mind of every person" as a reflection of the Wakeley court's reference to laws "notifying and warning the taxpayer and the citizen generally that the state or municipality will undertake the burden of such damages." It is important, nevertheless, to understand that the Montana court never discussed the concept of "moral obligation" in Butte Miners' Union. The decision dealt, rather, exclusively with the power of the legislature to impose municipal liability for mob violence and the necessity for a court, confronted with a suit arising from such violence, to not "write exceptions into a law the Legislature has not seen fit to

345. 194 P. 149 (Mont. 1920).
346. MONT. CODE ANN. § 3485, quoted in Butte Miners' Union v. City of Butte, 194 P. 149, 150 (Mont. 1920).
347. Butte Miners' Union v. City of Butte, 194 P. 149, 150 (Mont. 1920).
348. Id. (quoting City of Chicago v. Sturges, 222 U.S. 313, 323 (1911)). It is worth noting that the Court, in City of Chicago, recognized a classification power that is consistent with that in place in many jurisdictions, but arguably conflicts with the approach embraced in Haman:

The power of the state to impose liability for damage and injury to property from riots and mobs includes the power to make a classification of the subordinate municipalities upon which the responsibility may be imposed. It is a matter for the exercise of legislative discretion, and the equal protection of the law is not denied where the classification is not so unreasonable and extravagant as to be a mere arbitrary mandate. City of Chicago v. Sturges, 222 U.S. 313, 324 (1911). The Court observed that "[a] city is presumptively the more populous and better organized community. As such it may well be singled out and made exclusively responsible for the consequences of riots and mobs to property therein." Id. This is arguably at odds with the position taken by the Nebraska Supreme Court on the subject of public dancing on Sundays. See supra text accompanying notes 244-46.
place there.”

That does not mean that the Montana court has been silent on the subject. In 1923, slightly less than three years after Butte Miners’ Union, the court rejected the argument that moral obligation provided a valid foundation for a measure authorizing the issuance of bonds to pay bonuses to individuals who had served in the armed forces during World War I. The court, in language that tracks the spirit of the position embraced in Haman, if not its letter, stated that “it is well-settled law that the public money cannot be used to pay a gratuity to an individual when he is without legal claim to the money, and when it cannot be fairly said the public good will be served by such payment.”

In this instance, the court argued, no valid public purpose was served when a state paid a bonus to veterans, as opposed to one that might be paid by the federal government under whose authority they served. The court acknowledged that fulfilling the moral obligation might be desirable. It stressed, however, that “our jurisprudence has not attained that end. It knows only the obligation whose discharge may be compelled by legal action.”

This approach had, however, an exceedingly short life span. In 1926 the court considered whether the legislature could authorize a Mr. George Rietz, a student at the state university, to present a claim, to the state board of examiners for injuries he had sustained. It seems that Mr. Rietz, who on the first day of his enrollment was, understandably, “not familiar with the surroundings,” was assigned to a dormitory where “on the same floor and near his room were two doors about two feet apart, one of which led to the bathroom and the other into the elevator shaft.”

[W]hen he undertook to go to the bathroom, through mistake he opened the door leading to the elevator shaft, and, the shaft being unguarded and the elevator above that floor at the time, he fell down the shaft to the bottom of the pit and sustained serious, permanent injuries, on account of which he incurred large expenses, only a part of which has been repaid to him . . . .

Relying on the “gratuity” principle articulated three years earlier, the secretary of state argued that the measure authorized a “gift” to Rietz and did not, accordingly, serve a valid public purpose. This

352. Id. Bonus legislation was common in the wake of the war, and provided the impetus for a number of other cases whose results and doctrines are important for our purposes. See infra text accompanying notes 353, 382-88, 669-72 and 702.
354. Id.
355. Id. The decision does not indicate what sort of student Mr. Rietz was. The image of a law student, deeply immersed in the nuances of a case and oblivious to his surroundings, comes readily to mind.
prompted the court to reexamine what constituted a "legal claim." It indicated that:

[If, in advance of the injury, the state had, by general law, assumed liability for the negligence of its agents in charge of the university buildings, there would not be any dissent in the authorities from the conclusion that an appropriation to discharge such liability would be for a public purpose.356

It rejected, however, the notion a preexisting declaration was required, expressly overruling that portion of previous decision:

We do not discover any provision of our Constitution which forbids the Legislature to assume liability for injury resulting from the negligence of the state's agent, whether the liability is assumed before or after the injury occurs, and to say that the state may assume such liability but may not discharge it is simply to make the law ridiculous. . . . Common sense is the essence of the law, and that which is not good sense is not good law.357

This, as the Montana court subsequently noted, laid to rest any notion "that a moral obligation was not sufficient to support an appropriation of public money,"358 an observation included in a case that also made clear that there could no longer be any dispute that state bonuses to veterans also served a valid public purpose.

Two other cases central to Wakeley, Commissioners of Sedgwick County v. Bunker359 and Bennett v. Fisher,360 are equally revealing. Bunker, a Kansas case, was cited in the passage in which the Wakeley court indicated that a moral obligation could arise in either of two situations, with the court quoting Bunker to the effect that "the Legislature may in many cases pass retrospective laws to enforce previously existing moral obligations."361 Bunker accordingly provided the predicate for the court's observation that a moral obligation could arise where there is an existing "obligation to do or perform the act or duty prescribed thereby."362 The Bunker decision itself focused on whether the residents of a strip of territory "detached" from one county and incorporated into a second county should be relieved from paying their proportionate share of bonded indebtedness incurred while still part of the first county. Because of certain technical problems with the applicable legislation, "[s]aid strip of territory was therefore left by the legislature under a supposed moral obligation . . . but without any legal means of enforcing such moral obligation."363
The court recognized, as indicated, that "the legislature may in many cases pass retrospective laws to enforce previously existing moral obligations." It also stated, seemingly in line with Haman, that "courts cannot enforce merely moral obligations where no legal obligations exist." But it did so, within the contexts of the case before it, in a manner that made Bunker strikingly similar to Wakeley:

[If there was any such moral obligation the legislature should have known it, and should by unmistakable language have made the act of 1873 broad enough to provide for enforcing it. That is, they should have converted the moral obligation into a legal obligation. But as they did not do so, although they had the subject under consideration, it would seem that they did not intend that such moral obligation should be enforced.]

The problem, then, was not the inability of the legislature to recognize a moral obligation, but its failure to do so expressly, a defect that cannot be attributed to the Unicameral in its drafting and passage of L.B. 272A.

The only Kansas case to cite the major United States Supreme Court case on moral obligation, United States v. Realty Co., does not change the analysis. In Winters v. Myers, the Kansas court held that a legislative transfer of certain land was invalid since it "has the effect of thus transferring the property of all the people, without compensation or public advantage, to a few ...." Moral obligation, and Realty Co., were cited by the dissenting justice as a basis for sustaining the act. The majority opinion did not, however, discuss the issue. The court's decision rested instead on the total lack of a public purpose, a factor not present in the case of L.B. 272A. Indeed, the majority seems to state that it would not have rejected a moral obligation rationale, if there had been the slightest possibility that a public purpose was at issue: "These considerations, however, relate only to the wisdom of the law, and the question is simply one of legislative power.

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364. Id. at 504.
365. Id. at 503.
366. Id. at 503-04.
367. In her reply brief the plaintiff in Haman argued that Bunker did not "speak[] to the present situation where the Legislature in LB 272A seeks to discharge a moral obligation to a particular group of citizens." Reply Brief of Plaintiff at 2 n.3, Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991)(No. 90-474). That may be true in the strictest possible sense, since the Kansas court held that the measure in question did not state that it sought to fulfill a moral obligation. It would not be accurate, however, to characterize Bunker as a case in which the Kansas court did not in fact recognize an inherent power to do exactly what L.B. 272A sought to do.
368. 163 U.S. 427 (1896). I discuss Realty Co. and the state cases interpreting and applying that decision in considerable detail. See infra text accompanying notes 679-728.
369. 140 P. 1033 (Kan. 1914).
370. Id. at 1038.
371. Id. at 1039 (Mason, J., dissenting).
If the act is within the power of the Legislature, it must be obeyed.”  

_Bennett_, in turn, was simply cited in _Wakeley_ as part of the court’s discussion of _Bunker_. In _Bennett_ the Iowa Supreme Court sustained a “curative” act involving the creation of a road where initial approval was given by the county board of supervisors “[b]ut the commissioner to view the same, was appointed by the clerk in vacation, and not by the board.”  

The court sustained the act, stressing that “[t]he recitals of the act in question are undoubtedly true, and its alleged motive, to wit, the prevention of trouble and litigation, was unquestionably its real motive.”  

It also indicated that “such legislation is sustainable, although it may injuriously affect particular cases.”  

The court’s discussion is troubling when transposed into the L.B. 272A dialogue from at least one point of view, the dispute about what the “real motive” of the legislature was when it approved that measure. However, that debate, which I pursue elsewhere in this article, has no bearing on the proposition for which _Bennett_ is cited in _Wakeley_: the circumstances within which a legislature may recognize a moral obligation, provided that is in fact what it is doing. In this regard it is worth noting that the Iowa Court’s discussion of retroactive legislation did not even hint at, much less expressly speak in terms of, an _absolute_ need for a preexisting obligation:

There is nothing in our Constitution prohibiting, in terms, the enactment of retrospective laws, and such laws are valid unless they violate some of the provisions of the National or State Constitution. To deny the legislature the power in any case to pass a retrospective law would be attended with very serious mischief.

The interests of justice and the general good of the community frequently require and sanction such legislation, although it should be borne in mind by the legislator that such exercises of power can only be defended upon principle and sustained in law when they are not directed against the vested rights of particular individuals or classes, but have their origin in a just regard for the public welfare.

Arguably, L.B. 272A offered a perfect example of a retroactive measure enacted in “[t]he interests of justice and [for] the general good of the community.” Moreover, it is quite apparent that the Iowa Court would not have viewed its version of article III, section 18, as the sort of constitutional provision to which it was referring, and that it would have rejected an assertion that the extraction of taxes raises the specter of an impairment of “vested rights.” Six years after _Bennett_, the Iowa Court was asked to determine if the Iowa General Assembly could retroactively authorize various public corporations to levy spe-

372. _Id._ at 1036.
373. _Bennett v. Fisher_, 26 Iowa 497, 499 (1868).
374. _Id._ at 501.
375. _Id._
376. _Id._ at 500-01.
cial taxes in excess of statutory limits to pay judgments that had been entered against them. Applying the principles articulated in *Bennett*, the court rejected both an attempt to characterize the act as a "local or special law" and the contention that vested rights were impaired. Citing prior case law, the court disposed of the special law challenge by observing that "the true construction of the act [is] that it operate[s] upon a particular condition, and attache[s] to it certain consequences, and that, whenever that condition exist[s], the consequences follow."377 The same situation, of course, prevailed regarding L.B. 272A: it was triggered by a particular condition, a "deposit," and attached to that condition certain consequences, redemption if and when the N.D.I.G.C. could cover the indebtedness. On the issue of a vested right, the court bluntly rejected the claim: "the legalizing of a tax, which but for the legalizing act was invalid and not capable of being enforced, does not interfere with any vested right of the tax-payer."378 The court stressed that the plaintiff would have had a right to request recovery of the taxes before the retroactive measure was passed. But the court emphasized that:

> [Upon the regular levy of taxes in pursuance of a legislative enactment, his rights in this respect are changed. His right to resist the payment of the taxes is gone. The statute has created a liability to pay where none existed before its passage, and this is so whether the act authorizing the tax levies be passed prior thereto or is an act legalizing a tax previously levied. In either case the power of the General Assembly to pass the law is the same. If it has no power to legalize a tax already levied without authority, it has no power to confer the authority in the first instance.379

The Iowa court was actually considering the underlying question, whether the taxes could be levied, for the first time; the legislation at issue had been passed in response to a prior decision invalidating the levies,380 a situation that paralleled that of L.B. 272A, which was itself a legislative response to the court's holdings in *Security Investment Co.* and *Weimer*. The Iowa decisions did not, admittedly, focus expressly on notions of moral obligation, but dealt instead with certain dynamics of retroactive legislative acts, a distinction the plaintiff pointed out in *Haman*.381 Any doubts about the willingness of the Iowa court to recognize such obligations were, however, emphatically laid to rest one year after *Wakeley* was decided in *Grout v. Kendall*.382 Moreover, the court's reasoning in *Grout* established that the "pre-

378. Id. at 121.
379. Id.
380. Iowa R.R. Land v. County of Sac, 39 Iowa 124 (1873).
381. Reply Brief of Plaintiff at 2 n.3, Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991)(No. 90-474)("[The *Bennett* case was strictly one of retroactivity and did not involve any discussion of moral obligations."]).
382. 192 N.W. 529 (Iowa 1923).
existing obligation” precept alluded to in Bennett was, as I have already stressed, a guide rather than a command.

The specific issue in Grout was whether the Iowa legislature could enact “bonus” legislation for the benefit of state residents who served in the armed forces during World War I. The funds in question were to be provided through the issuance and sale of $22 million in bonds. Ten constitutional challenges were lodged, the majority of which arose from the provision of the constitution dealing with state debts. In language strikingly similar to that employed in Haman, the court characterized the case before it as one in which “[t]he construction which appellant puts upon this section is that it prohibits the creation of any indebtedness regardless of its public purpose or moral obligation, if it operates ‘in aid of any individual, association, or corporation.’”383 The court stressed that the prohibition regarding “giving or loaning” credit to individuals, associations, or corporations was only one section of a comprehensive state debts article. It held, accordingly, that the bonds were a “primary” indebtedness and had been appropriately passed by the legislature and ratified by the electorate as required by the operative constitutional provisions.

It is the court’s discussion of moral obligation, however, that is of primary interest. The court summarized the position against the act as follows: “[t]hat the legislation makes appropriation for the benefit only of individuals and not for a public purpose; that the state is under no legal or moral obligation to make such appropriation; that, therefore, the appropriation is a mere gratuity.”384 The court conceded the truth of the first two propositions, and then rejected them, stressing that “[t]he analogies of private law in respect to valuable consideration are not particularly helpful in defining the legislative power to appropriate moneys for specified purposes.”385 It then stated that “[t]he great body of the obligations of a state are moral rather than legal,”386 and that “[i]t has been quite uniformly held by the courts that the determination of such questions inheres largely in the legislative power.”387 It also soundly rejected any notion that any “pre-existing” obligations are required: “Now, if there can be, in such cases, no legal obligation without legislative enactment, and no legislative enactment without pre-existing legal obligation, our reasoning is lost in the vicious circle.”388

It seems, accordingly, that not only is there more to Wakeley than

383. Id. (quoting IOWA CONST. art. VII, § 1).
384. Id. at 533.
385. Id. This observation is also of interest in light of the Haman court’s analysis of the “credit of the state” issue. See infra text accompanying notes 633-59.
387. Id.
388. Id. at 535.
the *Haman* court would have us believe, but there is also a different world view extant on the subject of moral obligation. That vision of government action and court acceptance of those decisions is obviously at odds with the one articulated in *Haman*. The fact that a more tolerant approach prevails in Montana, Kansas, and Iowa, jurisdictions whose decisions provided important underpinnings for *Wakeley*, does not mean, however, that this same perspective prevailed in Nebraska in the wake of *Wakeley*, even assuming, as I certainly do, that there is more to that decision than the *Haman* court would like us to know. There were in fact a large number of other cases decided by the court that bear, either directly or indirectly on this issue, only two of which the *Haman* court discusses and only then, as we shall see, incompletely. Moreover, to the extent those cases offer support for *Haman*—and many of them clearly do—the rationales on which they are predicated provide important insights into just why *Weaver* and its particular approach to substantive due process are ultimately indispensable elements in any proper explanation of *Haman*.

**B. Moral Obligation in Nebraska: The Pre-*Haman* View**

One of the decisions the *Haman* court does discuss is *Cox v. State*,399 a case the court characterizes as one "wherein the factual situation parallels the case at bar."390 That assessment is at best tenuous, and the reasons why it is specious play a direct role in the ability of the court to cite *Cox* for the proposition that "[w]hile the Legislature may make classifications, it cannot do so arbitrarily and unreasonably. A reasonable classification must operate on all within the class."391

The focus in *Cox* was on L.B. 20, an act "permitting Thomas Bailey et al to sue the state."392 The court characterized L.B. 20 as a measure that "created a liability in favor of this plaintiff for the tort of the state's agents and servants, resulting in an injury to her while she was traveling on a highway under the control of the state."393 The court found that L.B. 20 violated the ban on special legislation; "[t]he legislature is without force to pass a special law creating a liability in behalf of an individual and authorizing such individual to institute suit, in the absence of a general statute providing liability on the part of the state for the negligence of its agents and servants."394

The court stressed that the measure suffered from two flaws, both of which seem at first blush to bear directly on the issues posed in

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389. 134 Neb. 751, 279 N.W. 482 (1938).
391. *Id.*
394. *Id.* at 755, 279 N.W. at 485.
The first problem, dealing with the general question of a state's liability for the torts of its agents, arose from the retroactive nature of the act. As the court stressed, the constitution indicates that "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." The measure at issue in Cox was enacted "under this provision," rendering it "passed and intended as ... a special law in substance and form," permitting Cox alone to initiate a suit to recover for her damages. This posed problems, since "in order to impose a liability on the state, a law must be passed which imposes such liability equally and uniformly in favor of all persons, for future acts of negligence . . . ." A second difficulty arose, in turn, because of the particular limitations of article III, section 18, given that the act constituted a "special law" where an otherwise "general law can be made applicable." As the court stressed, "[t]o uphold this legislation would require individuals, similarly situated, to knock at the door of the legislature and ask that an exception be made in their particular cases, while others, less fortunate, may not be able to obtain the relief sought."

It would be a mistake, however, to read this as a general admonition that the state could not enact, and that the court would not sustain, legislation that compensated a named individual or class of individuals for specified injuries the state believed it had either a legal or moral obligation to redress. The court intimated in Cox that there could in fact be circumstances within which a "classification" that might otherwise run afoul of article III, section 18 would be sustained:

If any basis for the classification can be said to exist, it must be found in the peculiar facts and circumstances of the injuries sustained by this plaintiff. Legislative Bill No. 20 discloses nothing unique or peculiar in the circumstances of the alleged injury which would serve to distinguish it, either in a legal or moral sense, from any other wrongful act or commission of the agents or servants of the state. The act provides a special exemption in favor of this plaintiff—the right to recover for damages—which it denies to all other persons similarly situated.

There is nothing in this discussion indicating that it would be improper for the legislature to recognize distinctive personal needs or, for that matter, to create a classification that is in effect closed. Moreover, this indication that "unique" or "peculiar" circumstances could support legislative discharge of either a legal or a moral obligation remains "intimation" rather than documented fact in Cox only because the court did not there cite previous legislative acts or court decisions illustrating the phenomenon. Those cases, some of which were

395. NEB. CONST. art V, § 22.
397. Id. at 754, 755, 279 N.W. at 485 (emphasis added).
398. Id. at 758, 279 N.W. at 486-87.
399. Id. at 758-59, 279 N.W. at 487.
brought to the Haman court’s attention, did exist. In State ex rel. Sayre v. Moore, for example, the court considered whether the legislature could, retroactively, reimburse Scotts Bluff County for the costs incurred for a completed criminal trial. The court stated:

True, there is no legal obligation resting on the state to pay such expenses, but the power of the legislature to appropriate money is not limited by the legal obligations of the state... “Certain expenditures are not only absolutely necessary to the existence of a government but, as a matter of policy, it may sometimes be proper and wise to assume other burdens, which rest entirely upon considerations of honor, gratitude, or charity.”

The court made it clear that the functional effect of the appropriation was to make the state an “eleemosynary” institution: “[t]he appropriation of this money—a gift, in fact—was within the power of the legislature...” It also stressed, as it has in any number of cases, that the wisdom of the action was not an issue: “This appropriation may be unjust. In making it, the legislature may have acted unwisely. But of these things the legislature itself is the sole judge. The courts cannot inquire into either the motive or justness of the law. Their only concern is with its legality.” The court was not speaking here of a moral obligation created “only” by virtue of a pre-existing state promise to reimburse Scotts Bluff County for the costs of the trial. It recognized, rather, the power of the legislature to “assume other burdens, which rest entirely upon considerations of honor, gratitude, or charity...” The appropriation sustained in Sayre was then, using the words of the Haman court, an eleemosynary act entirely within the power of the legislature, a “gift” whose wisdom was not a proper concern of the court.

The allocation of state funds to a city or county does not, of course, stand in the same stead as an appropriation that will ultimately be placed in private hands, a point the plaintiff made in her reply brief in response to the discussion of Sayre by the Intervenor. It is interesting to note, however, that the court in Sayre discussed in dicta, with no

401. Id. at 860, 59 N.W. at 757 (quoting THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 608-09 (4th ed. 1878)).
402. Id.
403. Id. at 859, 59 N.W. at 757. The notion that neither the “wisdom” nor the “justice” of a legislative act matter if the legislature has the power to act has been a consistent theme in the court’s decisions. See, e.g., State ex rel. Douglas v. Nebraska Mortgage Fin. Fund, 204 Neb. 445, 458, 283 N.W.2d 12, 21 (1979).
405. See Reply Brief of Plaintiff at 3-4, Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991)(No. 90-474)(Sayre “readily distinguishable” because “reimbursement of a governmental subdivision... is a far different matter”). The Intervenor, who brought Sayre to the court’s attention, see Brief of Intervenor-Defendant Security Investment Company at 20-21 and 24 n.7, had already conceded that. Id. at 20 n.6. The point, as made here, was that the Sayre court apparently recognized the
hint of disfavor, precisely such an act, whereby the legislature in 1893 paid a claim that included both lost time and expenses and a "legislative gift or donation . . . containing an allowance for physical suffering."\(^406\) The act in question, House Roll Number 85 of 1893,\(^407\) noted that one George Maurer, an enlisted man in the Nebraska National Guard, had been "ordered out" by the governor "to protect the lives and property of the citizens of the State of Nebraska . . . against the depredations of the Sioux Indians who at said time were actively engaged in a war against the government of the United States."\(^408\) During his active duty Maurer "was exposed to the cold and freezing weather . . . and without any fault on his part, contracted rheumatism which soon became chronic, from which he suffered great physical pain and incapacitated him from work and preventing him from following his vocation and earning a living . . . ."\(^409\)

The Sayre court, drawing on the line of analysis developed with regard to the reimbursement of Scotts Bluff County, made clear its belief that it was well within the power of the legislature to make this "gift or donation." That action obviously differed in material respects from the waiver of liability condemned in Cox, since the legislation at issue in that case did not make a "gift" by paying the claim, but merely gave Reeta Cox an opportunity to litigate it. It also provided more detail than the measure at issue in Cox, detail that established the "peculiar facts and circumstances" that provided the "basis for the classification." The device implicitly recognized in Sayre is, accordingly, simultaneously more expansive than the sovereign immunity waiver at issue in Cox and much more in line with the essence of moral obligation, since it rested entirely on notions of gratitude and compassion, as opposed to simply allowing a party to press, in the face of active opposition by the state, a disputed claim.

Moreover, the approach embodied in Maurer's case represented a common device during the period prior to the creation of the Sundry Claims Board in 1943.\(^410\) Thus, for example, one finds specific, independent appropriations in 1939 for the "benefit" of Lillian Irene Smoyer,\(^411\) Ina F. Wathen,\(^412\) Joe Murray,\(^413\) and Jerome J. Brazda.\(^414\)

power of the legislature to honor a moral obligation toward a private actor, an argument to which the plaintiff never responded.


\(^{407}\) 1893 Neb. Laws 460.

\(^{408}\) Id.

\(^{409}\) Id.

\(^{410}\) L.B. 5, 1943 Neb. Laws 432 (codified at NEB. REV. STAT. §§ 81-8,236 to 8239 (1987)). Many aspects of the measure were subsequently rendered unnecessary by the passage of the State Tort Claims Act in 1969. 1969 Neb. Laws 2845 (codified at NEB. REV. STAT. §§ 81-8209 to 8232 (1987)).


\(^{412}\) L.B. 19, 1939 Neb. Laws 287.
In 1941, measures were passed appropriating funds for Lela Brock and Opal Bredehoft. The appropriation for Mr. Murray in particular reflected a discharge of moral obligation since, unlike most such measures, his situation did not present a personal physical injury or a need to provide compensation to a surviving widow or children. Rather, Mr. Murray was given the sum of two hundred and fifty dollars to make him whole after he had been convicted and incarcerated for two months for a robbery two other men subsequently confessed to having committed. The measure was, as the legislature stressed, passed in recognition of the fact that the usual ten dollar payment on release was insufficient:

Joe Murray has been incalculably injured in his good name, honor and reputation by the atrocious mistake made by the peace officers, the prosecutors and the courts of this state and in equity and good conscience, should, in a measure, be recompensed for the great wrong, humiliation and suffering which this unfortunate miscarriage of justice has brought to him. ...

Sayre is perhaps the best, but certainly not the only example of a decision in which the court recognized and affirmed what were essentially moral justifications for legislative enactments. Two years before Sayre, for example, the court was asked to assess the constitutionality of a measure authorizing counties to levy taxes in excess of the amount then authorized. The measure had been prompted by "[a] great calamity [that] fell upon a number of counties of this state last year, by which a large part or all of the crops were destroyed, and the people left in a suffering condition." The court indicated that "[w]e have been unable to find any provision of the constitution which prevents the legislature from authorizing the electors of a county from voting bonds for the relief of the unfortunate within its borders." This was, in the court's estimation, both a proper public objective and a valid "police regulation," for it:

enable[d] persons in straitened circumstances, who, without fault upon their part, have met with misfortune, and are thereby greatly impoverished, to start anew in the cultivation of their farms, with a reasonable prospect of success.—

420. Id. Under a strict reading of the theories originally advanced by the plaintiff in Haman, and arguably embraced by the court in Weaver, due process would prohibit this sort of relief. That rather parsimonious reading of the due process guarantee does not, however, seem to have been embraced, even by the court of the 1930's. For a general discussion, see David Fellman, Due Process of Law in Nebraska: History and Underlying Conceptions, 9 Neb. L. Bull. 223 (1930). For a discussion in the context of a specific issue, see Lester B. Orfield, Old Age Assistance: With Special Reference to Nebraska, 17 Neb. L. Bull. 287 (1938).
in other words, from being dependent, to soon become able to provide for all their own wants. 421

Clearly, it did not offend the constitution for the legislature to authorize "gifts" to private actors.

In 1909 the legislature passed an act authorizing Sherman County to pay a contractor for the materials he had furnished for the construction of a bridge. 422 The measure had been prompted by Gibson v. Sherman County, a successful taxpayer suit that "reversed the order of the county board allowing the claim because there were no funds with which to pay the claim legally available at the time the plaintiff entered into the contract with the county . . . ." 423 That result was dictated by a statute enacted in 1905, which barred any recovery:

for any article, public improvement, material, service or labor contracted for or ordered in contravention of any statutory limitation, or when there are or were no funds legally available at the time, with which to pay for the same, or in the absence of a statute expressly authorizing such contract. 424

The court rejected the argument that the legislative authorization of the payment improperly tried to reverse the judgment of the district court; "[t]he subsequent act of the Legislature was not a determination that the district court was in error in so holding, but its purpose and effect was to remove the bar to the remedy." 425 The fact that the payment was for an act that was authorized but in fact technically illegal was no problem, and the explanation provided by the court, while lengthy, is worth repeating in light of what was argued and accepted in Haman:

The county has received full value which, if the contract is invalid, still imposes a moral obligation to remunerate plaintiff, and there is no doubt under the authorities that it was competent for the Legislature to remove the technical bar of the statute, and in doing so would not exercise any judicial function. It is equally clear that this statute does not deprive the county of property without due process of law. The county has not resisted the payment of this claim. By its constituted authorities it has always recognized its moral obligation to pay the value of the goods received from the plaintiff and used by it for the public benefit. The Legislature has removed the only legal impediment to so doing, and it ought not to be prevented from doing what justice and equity require. The right of a taxpayer to appeal from the allowance of claims by the county board was not given by the Legislature for such purpose. 426

Obviously, a claim predicated on a contractual relationship provides a different set of considerations than those presented by L.B. 272A. Whatever "contractual" rights might have existed in the context of the guaranty fund were the result of relationships negotiated

423. 97 Neb. 79, 85, 149 N.W. 107, 108 (1914).
426. Id.
and entered into by purely private parties. *Gibson* is nevertheless compelling in the vision the court offers of an approach to legislative acts within which "justice and equity" are of at least as much importance as "law." It is this wider perspective that animated the court in cases like *Sayre* and *Gibson* and provided the impetus for legislative approval of L.B. 272A. That image of a just and compassionate society, as those cases and a proper reading of *Wakeley* and *Cox* indicate, recognized the propriety of a legislative response to individuals with a "moral right to the remedy given." That perspective, however, eroded over time in certain important respects in a series of decisions that, while never expressly abandoning these principles, nevertheless qualified them in ways that had a significant, albeit largely hidden impact on the result in *Haman*. One element of *Gibson*, the notion of "contract," and the role that a "contract" can play in discussions of public policy, is especially important, since *Cox* was by no means the first case to reach the court in which the propriety of a legislative act granting an individual the right to sue the state was at issue.

In 1903, for example, Lancaster County was given the authority to sue the state to recover certain tax funds that had been on deposit with a bank that failed and had been paid to the state by mistake. The court recognized the authority of the legislature to waive the state's immunity for "claims arising from contract or some direct legal obligation, and not claims arising from tort."\(^{427}\) On remand, however, "through mistake and inadvertence and without the knowledge of Lancaster county officials, the case was dismissed."\(^{428}\) A second legislative authorization to sue followed, with the state responding that the statute of limitations had run and that the legislative resolution did not expressly waive that defense. The court rejected the theory, stressing that the language of the measure imposed a "duty [on] the court to brush aside technical defenses and to act in like manner as if the parties were seeking to amicably settle their controversy, and 'as upon the testimony right and justice may require.'"\(^{429}\) The court then ruled on the merits, supporting the county's claim that "[i]n justice, equity, and good conscience, which is all that the statute authorizing this suit requires, that amount should be returned by the state to the county . . . ."\(^{430}\)

In 1913 the legislature authorized a power company to bring suit against the state to recover funds paid to the state "upon the belief and upon the assurance of the secretary of the [state board of irrigation, highways and drainage], that there was water in the streams subject to

\(^{427}\) [Lancaster County v. State, 74 Neb. 211, 213, 104 N.W. 187, 188 (1905).]

\(^{428}\) [Lancaster County v. State, 97 Neb. 95, 97, 149 N.W. 331, 331 (1914).]

\(^{429}\) [Id. at 98, 149 N.W. at 332 (quoting NEB. REV. STAT. § 1180 (1913)).]

\(^{430}\) [Id. at 100, 149 N.W. at 333.]
appropriation." The company had relied on the statements of the board secretary in filing two applications subsequently determined to be precluded by a prior application. The court recognized the authority of the legislature to suspend "the ordinary rules of law which prevail in controversies between individuals" and authorize a case to "be determined upon equitable principles based upon justice and right." Moreover, the court stressed that this was "a special proceeding by virtue of special statutory provisions, and the respective rights of the parties are to be determined by the rules therein prescribed." There was, nevertheless, no mention of the bar against special legislation; the measure, which granted special privileges and created a permanently closed class of one company, was sustained "under all the circumstances [of] justice and right as well as equity and good conscience, [which] would seem to dictate that the money be refunded."

Two years later the court invalidated an act authorizing a suit to recover for the loss of cattle after a supply of water had been negligently cut off by a state surveying party. The employees had committed a trespass and the actions that led to the loss were outside the scope of their employment. The court stressed that "[j]ustice and right do not require innocent taxpayers or the public at large to bear such burdens, created solely, as they were, by private persons, but the state has made provision for the punishment of trespassers and for the redress of private wrongs." Commonwealth Power was distinguishable, since that case was predicated on "plain principles of equity leading to justice and right," whereas the measure at issue proposed the "radical and alarming step" of subjecting the state "to a one-sided 'special proceeding,' where the state, though committing no wrong nor violating any obligation nor neglecting any duty, is denied the protection of both law and equity and held liable for damages caused by the wrongful acts of individual trespassers ...." That rule did not apply in City of Chadron v. State, a case decided five years later, however, since "[t]he act of destruction arose in and because of the performance of the work itself, and not aside from its scope."

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432. Commonwealth Power Co. v. State Bd. Irrigation, Highways & Drainage, 94 Neb. 613, 143 N.W. 937 (1913). This reliance, and the court's tolerance of it, conjures up images of the Haman court's misplaced invocation of the "ignorance of the law is no excuse" doctrine and the more lenient approach embraced in Preisendorf Transport. See supra text accompanying notes 122-35.
434. Id.
435. Id. at 443, 177 N.W. at 746.
437. Id. at 136, 190 N.W. at 212.
438. Id. at 137, 190 N.W. at 212-13.
Moreover, since the city had been expressly given the authority to sue the state the normal rule that interest would not be awarded "against a sovereign government unless its consent to pay interest has been manifested by an act of its Legislature or by a lawful contract of its executive officers" did not apply.\textsuperscript{440} The circumstances "justly . . . call[ed] for payment of interest [and] the state should not be exempted from such payment by reason of its sovereignty."\textsuperscript{441}

The distinctions that provide the final foundations for Cox begin to emerge in a series of cases decided just prior to Weaver. In \textit{Shear v. State} the court barred a suit in tort authorized by the senate "for the purpose of ascertaining and adjudicating [the] claim and the liability of the state for the payment thereof."\textsuperscript{442} The court stressed that "[t]he resolution simply gave the right to bring the action, but did not create a cause of action."\textsuperscript{443} It then articulated the principle recognized in Cox, that "[t]he Legislature has not by law granted to anyone the right to recover against the state damages for negligence of any of its officers, agents or employees, and, until such legislation is enacted, no recovery against the state can be had for such negligence."\textsuperscript{444} That rule subsequently controlled the result in \textit{Kent v. State},\textsuperscript{445} a case cited in Cox.

In \textit{McNeel v. State},\textsuperscript{446} however, the court indicated that a different set of considerations arose when the suit sounded in contract rather than tort. The court indicated that a statutory provision in place prior to the resolution authorizing the \textit{McNeel} suit provided an "exclusive" remedy for a contract claim, as distinguished from tort: "a claim in the first class must be presented to the auditor with the right of appeal from his decision and the second must be presented to a district court with legislative authority to sue the state."\textsuperscript{447} The landscape was expanded even further in \textit{Gledhill v. State},\textsuperscript{448} a case that also began with a legislative authorization to sue when "the state built [a] temporary bridge in a negligent manner and . . . as a result of the method of construction, the damage resulted."\textsuperscript{449} The theory of recovery in this instance, however, was slightly different; a claim that the state had taken private property without just compensation. The court held that "[i]t would be unconscionable for the state, which ought to set an example of just and fair dealing, to save money by the erection of a

\textsuperscript{440} Id. at 658, 215 N.W. at 138.
\textsuperscript{441} Id.
\textsuperscript{442} 117 Neb. 865, 866, 223 N.W. 130, 130 (1929).
\textsuperscript{443} Id. at 865, 223 N.W. at 131.
\textsuperscript{444} Id. at 869, 223 N.W. at 131.
\textsuperscript{445} 118 Neb. 501, 225 N.W. 672 (1929).
\textsuperscript{446} 120 Neb. 674, 234 N.W. 786 (1931).
\textsuperscript{447} Id. at 675, 234 N.W. at 788.
\textsuperscript{448} 123 Neb. 726, 243 N.W. 909 (1932).
\textsuperscript{449} Id. at 731, 243 N.W. at 912.
cheap, inadequate, and temporary bridge for the public use, thereby
causing great damage to the owners of private property without
compensation.”

The various threads that converged in Cox seem, accordingly, to
indicate that a suit in tort would be proper where the state’s direct
involvement is clear and the facts of the situation, as documented by
the legislature, demonstrate the “equity and justice” of the claim.
Where property rights are at stake, both considerations of justice and
the nature of property rights combine to allow the action to proceed.
In Shear for example, the court drew a distinction between that case
and cases like Lancaster County and Commonwealth Power, stressing
that “in each of those cases plaintiff could recover the money so paid
to the state, under the facts shown.” It also stressed the property
dimensions of Lancaster County and City of Chadron, cases “where
the state had taken or received property wrongfully” and “was liable
for the amount so taken and received.” Finally, contract actions are
recognized both in light of the different nature of the rights at stake
and the provisions in the statutes allowing such claims to be presented
to the auditor, with a right of appeal from his decision. The point is
not, of course, to establish that any of these cases, alone or in combina-
tion, should have controlled the result in Haman, although they do
determine a series of principles that support the validity of L.B. 272A.
It is, rather, to demonstrate that the analytic matrix is substantially
broader and more complex than Haman would lead us to believe.
More importantly, these cases also belie the truth of the plaintiff’s
contention that the four decisions she chose to discuss establish that
on “every” occasion that the court has entertained the issue “retroac-
tive legislation to compensate private individuals” has been found
unconstitutional.

C. When Is a Guaranty Not a Guaranty: Weaver and Hubbell Bank

These themes, and the sometimes inconsistent results that emerge
from the various cases, provide important insights into what actually
transpired in the other two cases actively argued in the Haman briefs,
Weaver and Hubbell Bank v. Bryan. Those two decisions were,
from one very important perspective, potentially the most important
precedents available to the court, for they both dealt with attempts by

450. Id. at 732, 243 N.W. at 912.
452. Id. at 868, 223 N.W. at 131.
453. 124 Neb. 51, 245 N.W. 20 (1932). Hubbell Bank is criticized in Note, Constitutional
Law—Limits of Police Power—Change of Economic Conditions Affecting Valid-
ity of Police Regulation, 1 GEO. WASH. L. REV. 402 (1933), and Recent Decisions,
Constitutional Law, Validity of Final Settlement Fund Laws, 19 VA. L. REV. 295
(1932).
the legislature to fashion a means to reimburse depositors for losses incurred when the banks in which they had placed their funds failed. Perhaps even more importantly, both arose from the inability of the modern guaranty fund’s predecessor, the Guarantee Fund Commission, to honor its commitments.454

The legislative act examined in Weaver, generally referred to in the cases as Chapter 33,455 was an attempt to appropriate funds to pay certain claims that the depositors’ guarantee fund could not satisfy. The plaintiff in Haman characterized the “situation” in Weaver as “nearly identical to that presented by LB 272A” and Chapter 33 as “remarkably similar in its essentials to LB 272A.”456 There were certain superficial similarities. Chapter 33 represented an attempt by the legislature to appropriate up to $260,111.34 from the General Fund to repay depositors for losses sustained in excess of the balances in the then existing bank deposit guaranty fund. The court invalidated the measure, finding a due process violation when the state “tak[es] . . . money belonging to one class to pay the claims of those of another class” and that “[c]learly it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution.”457 These statements would seem to offer compelling arguments against L.B. 272A, and it seems curious that the court makes so little use of them and of Weaver itself, other than the gibe about the state as eleemosynary institution. But a careful examination of both the actual terms of the act challenged, the guaranty funds provisions upon which the legislative action was predicated, and the core constitutional rationale in Weaver make it clear why the court decided it was best to avoid a detailed explication of that case.

As a threshold matter, Chapter 33 was completely devoid of any references to an overarching public purpose. It spoke only of “claims,” and made no attempt to provide the wider context and more expansive purposes encapsulated in L.B. 272A. Given the intellectual foundations of Weaver, the fact that the measure was silent regarding a wider public purpose may not have mattered; the court was clearly reluctant, as a basic philosophical matter, to accept the implicit moral obligation. Nevertheless, the silence of the legislature on the general issue of public purpose, and the differences between the prior guar-

ancy fund and the N.D.G.I.C., are important in at least one respect that bears directly on the notion that the moral obligation must somehow be "preexisting."

The purpose of the N.D.G.I.C. is to "provide a mechanism whereby the shareholdings, savings, and deposits of any member or depositor . . . shall be protected or guaranteed up to amounts which are established by the corporation . . . ."458 The provisions of the earlier guaranty fund were, however, less sweeping: the guaranty fund "protect[ed]" depositors, and the Guaranty Fund Commission simply "assist[ed] in conserving and administering" the Fund.459 Admittedly, it was implicit within the statutory scheme that the "protection" afforded would be complete. The earlier guaranty fund provided a mechanism by which the initial and annual assessments levied could be supplemented by special assessments.460 Nevertheless, the statutes creating the N.D.G.I.C. imposed a positive obligation on the member institutions to "display at each place of business maintained by it a sign or signs indicating that its member or depositor accounts are protected by the corporation and shall include in all of its advertisements a statement to the effect that its member or depositor accounts are protected by the corporation."461 There was no similar requirement in the statutes creating the prior fund. Indeed, as the court itself recognized, whatever public notoriety the 1923 amendments might have attained was in large measure created by the banks themselves through a massive, post-passage advertising campaign.462 This, as we shall see, is a matter of no small importance to a court that will in Weaver stress the extent to which government, at least in its estimation, is obligated to leave people to the consequences of their own decisions and devices.

Moreover, the presence or absence of an express declaration of public purpose is far from irrelevant. This factor was brought home by the treatment afforded Wakeley in the only jurisdiction to cite that case, other than Nebraska in Hubbell Bank. That state was, interestingly enough, New Hampshire.463 In 1959 the New Hampshire Supreme Court was asked to render an opinion on the constitutionality of a measure "to reimburse innocent depositors of Valley Trust Company, for losses suffered . . . ."464 The court responded by indicating that the measure would violate the constitutional ban on taxation

461. NEB. REV. STAT. § 21-17,144 (1989).
463. That is to say, the New Hampshire that was home to Justice Souter, whose opinions the court embraced in Haman for no discernable purpose other than the pleasure of quoting him.
to aid private parties. Citing a prior opinion, it stated that "[u]nconditional aid is not a proper charge of government to be met by the taxpayers." 465 It then declared, citing Weaver, that "[b]anks, like insurance companies and utilities, are regulated in the public interest but their failure or financial losses do not create a state debt to depositors, policyholders, and stockholders which can be met by the appropriation of public funds." 466 Two years later a different measure, also directed toward the relief of the Valley Trust Company depositors, came before the court. 467 It posed two choices: an assessment against other banks, or the use of tax funds. Citing its first opinion on the matter, the court rejected the tax option. It then indicated, in language that echoed Hubbell Bank, that the assessment against the other institutions would "select an arbitrary class of taxpayers to contribute to a single bank. This would place upon the contributing banks the unequal burden of paying more than their just share of governmental expense." 468

These two decisions seem, at least on their face, to provide support for the results in Weaver and Hubbell Bank and, by implication, Haman. It would appear, however, that the flaw in the measures was not so much its objective as the failure to articulate a credible public purpose. In 1937, for example, the New Hampshire court was asked if it would be constitutional to "pledge the full faith and credit of the state to guarantee the payment of bonds . . . for the purpose of raising money to construct a dam . . . ." 469 The dam would allow a private company to generate electric power, an objective that required the court to answer whether "in reality [it] proposes to grant public aid to private industry[,] [t]o the extent of such a purpose it would be invalid." 470 The court, in language that raises but does not directly pose the specter of moral obligation, indicated that "[t]here is no power of the Legislature to pass 'wholesome and reasonable' laws if they are 'repugnant or contrary to' the Constitution." 471 The court then ex-

465. Id. at 408 (quoting In re Opinion of the Justices, 190 A. 425, 428 (N.H. 1936)).
466. Id. The mention of insurance companies by the court is interesting in light of another, little discussed act that has been passed by the Nebraska legislature, the Nebraska Property and Liability Insurance Guaranty Association Act. See L.B. 722, 1971 Neb. Laws 1 (codified at Neb. Rev. Stat. §§ 44-2402 - 2409 (1987)). L.B. 272A noted that the enactment of this measure "has allowed state funds by means of premium tax credits to be used to protect policyholders in insolvent insurance companies, and the same principle should be extended to depositors in insolvent industrial companies." L.B. 272A, § 2 § 5. Time and space do not allow me to explore the implications of this, either for the validity of Haman or the continuing viability of the insurance association guaranty.
468. Id. at 126.
470. Id.
471. Id.
amined various aspects of the measure, guided by the principles that "indirect" aid to a private actor would not invalidate an otherwise proper public purpose and that legislative declarations of purpose would "be accepted as true unless incompatible with its meaning and effect." The court recognized that its discussion of the issues might induce the legislature to alter its approach: "You are not to understand that we think a finding of a purpose of private benefit to which public benefit is incidental, in connection with the project, ought to be made." It concluded the opinion, nevertheless, with these observations:

Otherwise stated, if development of electric energy in the use of the water of the river as promotive of the state's industrial and economic welfare is the controlling element of consideration and is in mind as the inducement and goal sought by the contracts, they may properly be entered into. If the particular utilities are in mind, to be aided in the improvement and increase of their water power, which they are to pay for through the use of the state's credit, the agency's power to contract therefor has not been granted.

This theme—the need for and virtually conclusive effect of a declaration of public purpose—subsequently played an important role in a series of cases dealing with the issue of industrial development. Those decisions established two things: that the determination as to whether a particular project is "of public use and benefit" is an "inquiry not of law, but of fact," and that "valid" findings on this question, initially by the legislature in authorizing the program and then by the city implementing it, are entitled to great weight. Legislative findings are not dispositive; they "have no magical quality to make valid that which is invalid but they are entitled to weight in construing the statute and in determining whether the statute promotes a public purpose under the Constitution." The review is, nevertheless, deferential rather than searching: "[u]nless a court can clearly see that a law purporting to have been enacted to protect the public health and morals has no relation to those objects, it cannot set it aside as unconstitutional and void." "Any fair reason" will sustain the act.

Thus, the only state court to ever cite Wakeley in the manner that the Haman court would have us view that decision embraces a view of its obligations and enforces rules of constitutional construction that are diametrically opposed to those the Haman court invokes.

A second factual distinction between Weaver and Haman was that

472. Id. at 429 (quoting Lajoie v. Miliken, 136 N.E. 419, 423 (Mass. 1922)).
473. Id. at 431.
474. Id.
Chapter 33 was designed to compensate depositors for the loss of funds placed in banks that had \textit{already} failed and that the depositors, at the time of their decision, \textit{knew} had failed. The \textit{Weaver} court began its opinion with that observation, stressing that "their money . . . was deposited by them therein while the banks were closed and were being operated by the guaranty fund commission."\footnote{480} L.B. 272A, on the other hand, was intended to provide compensation for funds entrusted to a closely regulated institution \textit{prior} to any public knowledge that the institutions or the corporation that "insured" them were at risk. Indeed, funds were deposited in many instances at a time when the Department of Banking was actively concealing the suspect condition of Commonwealth. Those deposits were made in the face of a statutory mandate that the "insurance guaranty" be displayed and advertised. And they were made during the course of a consistent pattern of official state action and inaction that, while not perhaps meeting the "legal" thresholds imposed by the State Tort Claims Act or N.D.I.G.C., was certainly consistent with what L.B. 272A argued was a preexisting moral obligation to make good promises statutorily impelled.

The legislative actions examined in \textit{Hubbell Bank} were, like those construed in \textit{Weaver}, also clearly distinguishable from those taken in L.B. 272A. As a threshold matter, unlike either \textit{Weaver} or L.B. 272A, \textit{Hubbell Bank} did not involve an allocation of state tax dollars. Chapter 6, Laws 1930, did two things to set up the fund whose validity was at issue:

\begin{quote}
[it] transfer[red] . . . assets from the depositors' guaranty fund to the depositors' final settlement fund, including certain assessments against the banks which had not been paid, accruing under the old law, and provided for an assessment to be levied upon the state banks for a period of ten years based upon their average daily deposits.\footnote{481}
\end{quote}

The central problem in \textit{Hubbell Bank} was, accordingly, not the \textit{end} that Chapter 6 sought, the redemption of claims, but the \textit{specific means} employed. As the Court stressed:

\begin{quote}
[Chapter 6, Laws 1930] provided that those who had claims as depositors in banks which had failed prior to March 18, 1930, under the old Guaranty Fund Law should be paid from this new fund pro rata. It repealed the old Guaranty Fund Law, not only by a specific repealing clause, but by also changing the provisions by almost every section of the new law. Consequently, it marked the end, from a legislative standpoint, of the depositors' guaranty fund.\footnote{482}
\end{quote}

Thus, unlike L.B. 272A, Chapter 6 both repealed the operative guaranty fund provisions and \textit{expressly} included within its classification only those individuals who had claims at a specific, identifiable, and forever frozen point in time. It was because of these actions, actions

\begin{itemize}
\item \footnote{480} Weaver v. Koehn, 120 Neb, 114, 115, 231 N.W. 703, 703 (1930).
\item \footnote{481} Hubbell Bank v. Bryan, 124 Neb. 51, 53, 245 N.W. 20, 22 (1932).
\item \footnote{482} Id. at 53-54, 245 N.W. at 22.
\end{itemize}
that the Ninety-first Legislature did not take in L.B. 272A, that Chapter 6 served no public purpose:

[Chapter 6] had for its sole and only purpose the payment of the claims of depositors in banks which had failed prior to its enactment by levying assessments upon solvent state banks whose depositors did not come within the purview of the act. In practical effect, this new act destroyed the confidence in state banks. It does not stabilize commerce but tends to disrupt it. 483

The court contrasted this approach with that employed by other states, stressing that "in no instance has a state Legislature attempted to provide for future assessments to pay off the losses in other banks in the past." 484 It also tried to account for the decisions of the United States Supreme Court sustaining deposit guaranty acts as a valid exercise of the police power by arguing that the "precise" issue presented in Hubbell Bank was not posed in those cases. That was true, as far as it went, since those decisions involved different questions. It is interesting to note, however, that the Oklahoma statute provided that reimbursements would be made from the fund to date "and from additional assessments if required." 485 The same phenomenon was evident in Abie State Bank v. Bryan, where the Court expressly recognized that the amending legislation "provid[ed] for a limitation of future assessments" 486 and, in subsequent passages, discussed those limitations in considerable detail. 487 Future assessments of private funds to be given to private parties are not then constitutionally suspect in and of themselves. They fail, rather, when they are extracted from individuals who themselves are excluded from any possible individual benefit by the simple act of abolishing the guaranty mechanism.

All of this is arguably beside the point. If it is a violation of due process to provide public funds to private actors, as the explanation of Weaver offered by the Haman court leads us to believe, similarities and/or differences between the old and new guaranty acts are irrelevant. This means that we should then look carefully at the due process rationale set forth in Weaver, an approach to both federal and state due process guaranties that denied that a public purpose could be served by a state decision to honor bank deposit guarantees.

D. Moral Obligation in a Post-Haman World: The Rebirth of Liberty of Contract and the Demise of Compassion

A careful reading of Weaver, and those aspects of Hubbell Bank that depend on Weaver, reveals that the heart of the matter was in fact a basic disagreement about whether a state appropriation to com-

483. Id. at 55, 245 N.W. at 22 (emphasis added).
484. Id. at 56, 245 N.W. at 23.
487. Id. at 780-81.
pensate for private losses served a legitimate public purpose. In *Weaver* the court stressed that the appropriation was "'not for a public purpose,'" and as a result "'involves the taking of the property of the public generally for the relief of private persons without obligation on the part of the state, either legal or moral.'"\(^{488}\) In particular, it emphasized that "'[t]he deposits herein were merely business transactions between the bank and the depositor and the public should not be made to pay for the losses that a depositor may have suffered in such transactions.'"\(^{489}\) The same doctrine lay at the heart of *Hubbell State Bank*: the "'new act... serves no public purpose which can justify the exercise of police power of the state.'"\(^{490}\) The court stressed, in the context of due process, that the true infirmity was that Chapter 6, by "'excluding depositors whose claims accrued since March 18, 1930, from participation and giving benefits to depositors in prior failed banks... deprive[d] plaintiffs of property without due process of law.'"\(^{491}\)

These decisions were, quite clearly, crafted by a court that adhered to the notion that "'liberty of contract'" provided a judicial trump card in the debate about what constituted a valid public purpose. Viewed in this manner, a bank deposit is "'merely'" an individual "'business transaction'" between the bank and the depositor. That, as the court had stressed in numerous past cases, presented a classic instance of "'a contract fairly entered into, and in compliance with which both parties have acted to the full discharge of their obligations thereunder...'"\(^{492}\) Accordingly, legislation affecting such relationships presented the question of whether a voluntary, private agreement "'must be deemed modified by the existing provisions of the statute, irrespective of the intention of the parties, as expressed in their contract.'"\(^{493}\) It could not, the court answered, because "'under the pretense of the exercise of [the police power] the legislature cannot prohibit harmless acts, which do not concern the health, safety, and welfare of society.'"\(^{494}\)

Interestingly, it is entirely possible that an argument could have been made that the court, by the time of *Hubbell Bank*, may well have assumed a different perspective regarding the notion expressed in *Weaver* that the depositors "'assumed the risk.'" In *State ex rel. Sorenson v. First State Bank*, the court observed that:

*[t]he state evidently desired to encourage its citizens to use a state bank and to deposit their funds therein, and, to some extent at least, insure the safety of...*  


\(^{489}\) *Id.* at 117, 231 N.W. at 704.


\(^{491}\) *Id.* at 55-56, 245 N.W. at 23.


\(^{493}\) *Id.*

\(^{494}\) *Id.* at 147, 59 N.W. at 368.
such deposits if made pursuant to the provisions of the law. It must be observed that no depositor was required to deposit his funds in such a bank, but if he voluntarily did so, in compliance with the law, he would be entitled to the protection . . . . 

Nevertheless, both as a matter of what Weaver articulated, and as a general philosophical position, the world view of the Nebraska court in 1930 was clearly that of a court that was not inclined to allow a legislature to "tinker" with contractual relationships, formal or otherwise.

As indicated, the due process flaw in Hubbell Bank was the direct confiscation of private funds for a private purpose. In Weaver, on the other hand, it was an attempt by the state to restructure, by means of taxation, a relationship the parties had "voluntarily" entered with full knowledge of its conditions and circumstances. The question for our purposes is not whether liberty of contract, as a concept, is itself right or wrong. It is, rather, whether it was appropriate for the court, in response to a legislative act articulating a public objective and adjusting the benefits and burdens of private life on the basis of that policy decision, to determine for itself that "a law like the one before us involves neither the safety, the morals, nor the welfare of the public, and . . . the interest of the public is not in the slightest degree affected by such an act." 

Liberty of contract, viewed in this light, becomes a shorthand for accepting the ability of the Court in Lochner v. New York to reject, for no reason other than the conflict with its own preconceived notions, "the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in [bakeries and confectioneries] may endanger the health of those who thus labor." The standard of review was clearly a rigorous one:

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But the freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

Where a court's preexisting beliefs coincided with those of the legislature, of course, the results were different. Thus, in Muller v. Oregon, a restriction on the "liberty of contract" that limited the number of hours a woman could work was sustained since, in the Court's words,

496. Lochner v. New York, 198 U.S. 45, 57 (1905). The Court begins the paragraph within which this statement falls with the observation that "[t]here is no reasonable ground for interfering with the liberty of a person or the right of free contract, by determining the hours of labor, in the occupation of a baker." Id.
497. Id. at 69 (Harlan, J., dissenting).
"history discloses the fact that woman has always been dependent upon man."499 In doing so, the Court took "judicial notice" of the general belief that "woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she shall be permitted to toil."500

The same process of selective acceptance or rejection of legislative pronouncements was apparent in the decisions of the Nebraska court. In Wenham v. State, for example, the court declared:

All property in this state is held subject to rules regulating the common good and general welfare of our people. This is the price of our advanced civilization, and of the protection afforded by law to the right of ownership and the use and enjoyment of property itself. Rights of property, like other social and conventional rights, are subject to reasonable limitations in their enjoyment, and to such reasonable restraints and regulations by law as the legislature, under the governing and controlling power vested in them by the constitution, may think expedient.501

Taken at face value, this statement seems inconsistent with the notions that would emerge in Lochner three years later. Indeed, the court followed that passage with what appeared to be a rejection of liberty of contract: "[t]his power, legitimately exercised, cannot be limited by contract, nor bartered away by legislation."502 The court also made clear that it was, at least in theory, deferring to a valid legislative judgment that it had no right to question:

[The legislature] determined that the law in question was necessary for the public good, and the protection of the health and well-being of women engaged in labor in the establishments mentioned in the act. That question was one exclusively within their power and jurisdiction, and their action should not be interfered with by the courts unless their power has been improperly or oppressively exercised.503

That was clearly, however, not how the court would proceed if the measure did not coincide with its own values. Thus, in Wenham, the court went on to state that "[o]n the question of the right to contract, we may well declare a law unconstitutional which interferes with or abridges the right of adult males to contract with each other in any of the business affairs or vocations of life."504 In the same manner, a "Sunday law" that would otherwise have impinged on this same liberty of contract was sustained six years later, one suspects, in large measure because it comported with the Christian perspectives of Christian judges:

[W]e doubt very much whether there were any disciples of Mahomet in Ne-

499. 208 U.S. 412, 421 (1908).
500. Id. at 420.
501. 65 Neb. 394, 401-02, 91 N.W. 421, 428 (1902).
502. Id. at 402, 91 N.W. at 428.
503. Id. at 404-05, 91 N.W. at 424.
504. Id. at 405, 91 N.W. at 425 (emphasis added).
braska in 1873, and those who have emigrated to Nebraska since that day came here with full knowledge of the Sunday statute, and their appearance in our commonwealth will hardly render unconstitutional and void an act of the Legislature that theretofore was valid.\footnote{Ex parte Caldwell, 82 Neb. 544, 547, 118 N.W. 133, 135 (1908). See also Hall v. State, 100 Neb. 84, 90, 158 N.W. 362, 364 (1916)("the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, and to inherit, purchase, lease, sell, and convey property of all kinds. The enjoyment or deprivation of these rights and privileges constitutes the essential difference between liberty and oppression."); Low v. Rees Printing Co., 41 Neb. 127, 59 N.W. 362 (1894)(striking a measure attempting to create an eight hour workday).}

This was precisely the same sort of approach that would allow the court to focus, as it did in \textit{Weaver}, on the "voluntary business transactions" the depositors engaged in, rather than the right of the legislature to determine whether it was appropriate to use state funds to compensate for losses incurred, at least in part, as a result of state statutes and regulatory actions. This was, at least at the time that \textit{Weaver} and \textit{Hubbell Bank} were decided, a widely accepted judicial technique. It was also employed in that case in the face of an argument by Attorney General Sorensen that the appropriation served a transcendent public purpose: the continuing operation of the banks, which allowed the deposits to be made, "was not carried on primarily for the benefit of their stockholders or owners but for the purpose of conserving the bank guaranty fund which was obviously a public purpose."\footnote{Brief of Appellant at 6, Weaver v. Koehn, 120 Neb. 114, 231 N.W. 703 (1930)(No. 27424).} He also stressed the complicity of state officials:

\begin{quote}
It is a matter of common knowledge that misleading statements (not necessarily intentional) as to the security of deposits made in such banks continued to be made by employees of the commission in charge of such banks and perhaps in some cases by members of the commission itself long after it should have been obvious to any one with such a knowledge of conditions as the members of the commission should have had that such banks were not safe places in which to deposit money. It was with a knowledge of these facts that the legislature made the appropriation in question.\footnote{\textit{Id.} at 7.}
\end{quote}

He then discussed at length the power of a legislature to act upon and effect a moral obligation, stressing in conclusion that:

\begin{quote}
[I]t is to be borne in mind that none of the deposits under consideration would have been made if there had not been special statutory provision authorizing a state agency to carry on an insolvent bank as a going concern. Can there be any doubt that a moral obligation exists that is sufficient to sustain the appropriation under consideration?\footnote{\textit{Id.} at 11. This theme was echoed in a student note critical of the \textit{Weaver} decision, which argued that "it seems clear that the state is under a moral obligation to reimburse such depositors to the extent of these losses, and that therefore the decision in declaring the act in question unconstitutional was erroneous." Note, \textit{Constitutional Law—Taxation for Public Purpose—Appropriation to Reimburse...}}
\end{quote}
The court clearly had "doubts," but it is equally evident that those doubts were not predicated on the absence of an express public purpose, but rather on the personal refusal of the members of the court to give it credence. Whatever else might be said of this mind-set, it at least appears not to have reflected mere hostility to individuals, for the court subsequently made it clear that it would not allow the state to benefit either.509 Nevertheless, the sheer force of this attitude, and its implications for the state, becomes increasingly obvious when one examines decisions of the court rendered even after the “judicial revolution” that marked the demise of liberty of contract notions in the decisions of the United States Supreme Court.

For example, while the Court employed cases such as *Nebbia v. New York*510 to announce its intention to reject this prior method of adjudication, and *West Coast Hotel Co. v. Parrish*511 to signal the full significance of this trend, the Nebraska court “soldiered on,” arguably abandoning the approach exemplified in *Weaver* only when forced, in no uncertain terms, to do so. In 1936 it invalidated a “filled milk” statute, concluding that “the statute, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, [and is] unconstitutional as an invasion of the property rights of the individual.”512 The result, the court argued, was consistent with decisions in other states and the measure was materially different from the one sustained in *Hebe Co. v. Shaw*.513 One year later, with the announcement of *United States v. Carolene Products Co.*,514 the problems with those judgments became clear. The Court saw “no persuasive reason for departing” from *Hebe*, a decision that recognized “ample scope for the legislative judgment that prohibition of the offending article was an appropriate means of preventing injury to the public.”515 In a similar vein, the court in *State ex rel. Western Reference & Bond Ass’n v. Kinney*,516 sustained a challenge to a legislative

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509. See Svoboda v. Snyder State Bank, 117 Neb. 431, 435, 220 N.W. 566, 567 (1928)(regarding banks under the supervision of the prior guaranty fund commission; that “[i]f the bank finally succeeds and makes a profit, the state can claim no part thereof; if it fails, there is no liability upon the state to pay any portion of its losses”).


511. 300 U.S. 379 (1937).


513. 245 U.S. 297 (1918).

514. 304 U.S. 144 (1938).

515. *Id.* at 148.

516. 138 Neb. 574, 293 N.W. 393 (1940).
measure that attempted to "fix[] the maximum compensation which an employment agency may collect."\textsuperscript{517} Relying on what it deemed to be the continuing force of \textit{Ribnik v. McBride},\textsuperscript{518} the court determined that the agency was "not one 'affected with a public interest' . . . ."\textsuperscript{519} Rather, it was "engaged in a beneficial business" that was imbued with a "right of contract, common to all followers of legitimate vocations, [that] constitutes an asset of the relator and is part of the property, in the enjoyment of which relator is guaranteed protection by the Constitution."\textsuperscript{520}

That finding was summarily rejected in \textit{Olsen v. Nebraska}.\textsuperscript{521} Writing for a unanimous Court, Justice Douglas observed that the same cases that the Nebraska Court had considered "represent more than scattered examples of constitutionally permissible price-fixing schemes. They represent in large measure a basic departure from the philosophy and approach of the majority in the \textit{Ribnik} case."\textsuperscript{522} He then honed in on the core of the case under review and, as we have seen, the central tenet of \textit{Weaver} and \textit{Hubbell Bank}:

We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which "should be left where . . . it was left by the Constitution—to the States and to Congress." . . . There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field. In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. . . . Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.\textsuperscript{523}

The Nebraska court was not, admittedly, uniformly intransigent. In 1938, in the wake of \textit{Carolene Products}, it sustained a measure regulating ice cream, declaring simply that "[t]he right of the state, under the police power, to enact laws which are designed to provide a minimum amount of nutritional elements and prevent fraud and deception in the sale of foodstuffs . . . are not arbitrary, excessive, or unlawful exercises of the police power . . . ."\textsuperscript{524} But holdings of this sort were the exception, rather than the rule, in a state where the President of

\textsuperscript{517} Id. at 575, 293 N.W. at 394.

\textsuperscript{518} 277 U.S. 350 (1928).


\textsuperscript{520} Id. at 584, 293 N.W. 393, 398 (1940). For criticisms of the decision, see Dee C. Blythe, Recent Decision, 29 GEO. L.J. 110 (1940); Charles C. Spann, Note, 19 NEB. L. BULL. 307 (1940); Recent Decision, 27 VA. L. REV. 115 (1940).

\textsuperscript{521} 313 U.S. 236 (1941).

\textsuperscript{522} Id. at 245.

\textsuperscript{523} Id. at 246-47 (citations omitted).

\textsuperscript{524} State v. McCosh, 134 Neb. 780, 784-85, 279 N.W. 775, 777 (1938).
the University of Iowa would be invited to deliver an honors convocation address at the University within which he espoused the notion that the New Deal "zeal for the objective that no man shall starve physically may well obscure the ethical and spiritual values without which all life is meaningless. A full dinner pail, a chicken in every pot, may be nothing more than the quintessence of the ignis fatuus of a material communism." And it is hardly surprising in an era within which the world view articulated in *Weaver* tracked closely that of many prominent attorneys, who believed firmly that "[t]he Government set up for us at Washington is not and was never intended to be an eleemosynary institution or a foundation for miscellaneous charities. It was not designed as a universal parent or an earthly Providence."

It is not surprising, then, that the court as then composed seemed firmly wed to a *Lochner* view of the world and only belatedly embraced the perspective adopted in *Olsen*, within which are set forth rules of construction that have become the modern norm. The articulation by the United States Supreme Court of a standard for the interpretation of the federal constitution is, of course, suggestive rather than dispositive when the focus is on what the Nebraska constitution demands. The court has stressed, for example, that it will parse the provisions of the Nebraska constitution and will treat federal decisions construing "similar" constitutional provisions as suggestive rather than dispositive. It is, nevertheless, interesting to note that the court in *Haman* also made it clear that it will invoke the holdings of the United States Supreme Court when it suits its purposes. In this instance, the device was an appeal to the wisdom of Justice Cardozo at the juncture in the decision where the court was asserting its right to look beyond the professed motives of the legislature. At first reading the court's approach seems to add compelling force to the result it

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525. Eugene A. Gilmore, *Constitutional Integrity—Changing Concepts*, 14 NEB. L. BULL. 403, 405 (1936). Gilmore, who was characterized in the piece's biographical note as "a distinguished lawyer," id. at 403 n.*, was an uncompromising disciple of the liberty of contract school:

> True, private rights have been restricted in the interest of public health, morals, and safety. But restrictions based on an economic program which is a virtual contradiction of the rights themselves have been consistently resisted. A planned economy if it is really efficient and carried to its logical conclusion is a contradiction of an individualistic regime and a negation of natural rights.

*Id.* at 409.

526. John W. Davis, *Fundamental Aspects of the New Deal from a Lawyer's Standpoint*, 13 TENN. L. REV. 158, 160-61 (1935). Davis has been characterized as "the lawyer's lawyer," and the article was a reprint of a "radio address delivered under the auspices of the American Bar Association on December 22, 1934." *Id.* at 158 n.*.

reaches. Surely, we say to ourselves, a principle of constitutional interpretation espoused by one of the nation's preeminent jurists is worthy of respect. Unfortunately, the court's use of Justice Cardozo's words rings hollow on closer examination, a result that has little to do with the value of Justice Cardozo's insights and a very great deal to do with the legitimacy of the interpretive and argumentative techniques that provide the foundations for the *Haman* opinion and result.

One of the critical junctures in *Haman* is, as indicated, the line of analysis leading to the court's resurrection of *Weaver*. The author of the opinion begins the process with this:

> In the words of Justice Cardozo: "If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down." . . . This applies precisely to the classification in question. There is no reasonable and substantial relation between the classification and the stated objects of the legislation.\(^528\)

The invocation of Justice Cardozo's reputation as one of the nation's preeminent jurists was clearly deliberate: the passage from *Williams v. Mayor of Baltimore* is the only citation to a decision of the United States Supreme Court in the *Haman* opinion. That alone would arguably be of no great consequence since there is little room for criticism when a state court draws on the wisdom and reputation of the Court or one of its preeminent members. In this instance, however, resort to the Court and Cardozo for the particular principle espoused was clearly unnecessary since, as indicated, the court had previously stated that it would occasionally look beyond the terms of the statute when necessary.\(^529\)

The problem is that even the most cursory reading of *Williams* indicates that the quoted language, like much of the opinion in *Haman*, is divorced from the specific context within which it was uttered, a process that distorts rather than reveals the thought processes of the author and the holding of the Court. Justice Cardozo begins the segment in question with these observations:

> Time with its tides brings new conditions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one only or a few. If so the correcting statute may be as narrow as the mischief. The Constitution does not prohibit special laws inflexibly and always. It permits them when there are special evils with which the existing general laws are incompetent to cope. The special public purpose will then sustain the special form . . . . The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers.\(^530\)

As an initial matter, these comments quite clearly validate rather

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529. *See supra* text accompanying notes 231-33.

than destroy the approach encapsulated in L.B. 272A. The "special evil," the inability to satisfy depositor claims, is obviously a matter with which "existing general laws," in this instance the normal process of asserting a legal claim, "are incompetent to cope." The classification employed, in turn, was both "as narrow as the mischief" and consistent with an expression of legislative policy that should, in the normal course of events, fall within the wide "margin of discretion conceded to the lawmakers."

This alone indicates that the doctrine actually articulated by the Court in Williams stands for propositions quite different from those invoked in Haman. The difficulties posed by resort to Williams run, nevertheless, even more deeply when one considers the precise context within which the quoted passage falls, for the language noted by the court constitutes the first portion of a dichotomy:

If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down . . . . If special circumstances have developed, and circumstances of such a nature as to call for a new rule, the special act will stand.531

Justice Cardozo then states that "[t]he distinction is neatly pointed [out] by comparing two decisions."532 Ironically, the first of these, Mayor of Baltimore v. Minister & Trustees of Starr Methodist Protestant Church,533 involved a tax exemption deemed discriminatory because "[t]he burden of taxation will not be distributed over every class of property alike; but, on the contrary, one piece of a particular class of property will be exempt, while all of the other properties of the same class will be taxable."534 Justice Cardozo, in language that echoes the central complaint in Nebraska's own property taxation saga, indicated that the "court condemned [this] special act as a merely arbitrary departure from the rule of uniform taxation."535 He also stressed that "no evil had arisen, no circumstances had developed, to give even colorable grounds of reason for the adoption of a special rule."536

These sentiments form the heart of almost every one of the recent tax decisions and it is quite possible that this was on the court's mind as it crafted Haman. Indeed, a compelling case can be made that the decision in Haman cannot be divorced from a wider sequence of events within which the court was consistently forced to deal with legislative enactments that elevate politics over constitutional command. The court has stressed, for example, that the basic taxation rule is that "[u]nder the Nebraska Constitution, art. III, section 18 and art. VIII,

531. Id. (citation omitted).
532. Id.
533. 67 A. 261 (Md. 1907).
534. Id. at 263-64.
536. Id.
section 1, classification of property or business for taxation, whether
the tax is a property tax or an excise tax, can be permitted only if the
classification is reasonable and the tax operates uniformly upon all
members of the class."537 This tendency to treat tax matters as an
amalgam of the special legislation and tax uniformity clauses became
especially evident in *Natural Gas Pipeline Co. v. State Board of Equal-
ization & Assessment*, in which two of the judges caused major con-
cerns when they observed that:

> [W]hen property, regardless of whether it is real or tangible personal prop-
erness, is so classified that it provides exemption from taxation to all but a small
amount of property, the classification and exemption may well be unreasonable
and arbitrary and may fall within the prohibition of Neb. Const. art. III,
§ 18, which is this state's 'equal protection clause.'538

The tax situation, it should be noted, was clearly on the court's mind
at precisely the point that *Haman* was argued and decided, and implic-
ated many of the same concerns and constitutional doctrines. More
tellingly, the tax cases presented the court with precisely the sort of
legislative defiance and/or intransigence that would impel stricter
scrutiny of legislative actions. In a series of decisions, the court had
stated, in increasingly blunt terms, that there were substantial
problems. The legislature, for purely political reasons, refused to lis-
ten. *Haman*, in this respect, becomes the political straw that broke
the judicial camel's back, a legislative act that invited the court to look
beyond its express language and directly at what were incontrovert-
ibly for many senators "special" motivations.

> These realities do not, however, excuse a decisional technique
within which context is ignored and complete treatment eschewed in
favor of highly selective quotation. Moreover, the full implications
of the approach become tellingly clear when one examines the second
case discussed by Justice Cardozo in *Williams, Board of Police Com-
missioners v. McClenehan*,539 styled by the Court as *The Police Pen-
sion Cases*. As Justice Cardozo points out, the somewhat narrow core
of that decision was the court's finding that "here was a special case
not provided for or considered in an existing general law,"540 an obser-
vation predicated on the applicable constitutional prohibition that
"the General Assembly shall pass no special Law, for any case, for
which provision has been made, by an existing General Law."541 That
language tracks, at least in theory, the terms of Nebraska's article III,
section 18 prohibition, although it is quite evident that this is not the
basis on which the invalidation in *Haman* is premised, nor could it be.

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537. Thorin v. Burke, 146 Neb. 94, 102, 18 N.W.2d 664, 668 (1945).
538. 237 Neb. 357, 375, 466 N.W.2d 461, 472 (1991)(White & Fahrbach, JJ.,
concurring).
539. 101 A. 786 (Md. 1917).
541. MD. CONST. art. III, § 33.
The general law, in this instance the state claims process, is clearly inapplicable; no "legal" claims lie. Accordingly, the focus becomes moral obligation, or in this instance the ability of a legislature to set aside strict adherence to statutory requirements in a quest for simple fairness.

That, as Justice Cardozo stresses, is precisely what the Maryland legislature did in the case of Mrs. E. E. McClenehan, one of the plaintiffs in The Police Pension Cases. Mrs. McClenehan was a police matron, a class of employee that had been excluded from the pension scheme until 1906, at which point it was amended to allow individuals like her to enter:

so that they may enjoy the same rights and privileges and benefits, subject to the same limitations and conditions, as those conferred for the retiring of members of the police force, provided they pay to the special fund $10 per annum for three years, in addition to the regular percentage required 'under the special pension act.'

Mrs. McClenehan, who had been hired in 1900, complied with the terms of the new act from 1906 until her dismissal in 1912. The legislature, in spite of the fact that she had not fulfilled the sixteen year requirement, directed that she be paid a pension of $7.50 per week for life from the special fund. A second amendment passed in 1912, which allowed discretionary payments, was also inapplicable, since it was limited to "'any officer of police, policeman, detective, clerk or turnkey,'" a litany that did not include matrons. The Maryland court nevertheless sustained her claim, a decision that Justice Cardozo characterized as follows:

There were general laws upon the statute books providing for the grant of pensions to members of the police force, not including matrons. A matron was dismissed for physical disability after many years of service. The legislature, impressed by the hardship of her position, passed a special act for her relief. The court took the view that here was a special case not provided for or considered in an existing general law, and so upheld what had been done.

Justice Cardozo's admonitions regarding legislative motives that are "merely fanciful" may not then be properly viewed as a license for wholesale substitution of judicial for legislative judgments. The *Ha-man* court was arguably correct when it pierced the rather transparent fiction that L.B. 272A offered, or was ever likely to provide, a basis for reimbursing anyone other than the depositors of the three named institutions. The classification articulated in that measure was, as a practical matter, open in name only. There is also some justification for the position that depositors who knowingly placed themselves in dire straits in fact deserved to realize the "benefits" of their bargain,
particularly when those circumstances are in fact the sort that a de-
positor knows or should have known, as was the case in Weaver.

It is less clear, however, that a chain of events replicating the Com-
monwealth fiasco could not in fact occur, that the Unicameral would
not become a willing partner in such developments, or that the State
Department of Banking would not again aid and abet a similar future
fiasco. One would, for example, have assumed that the legislature
would not have undertaken the risks posed by the N.D.I.G.C. in light
of the lessons that it should have learned from the demise of the 1909
 guaranty fund and the court's holdings in Weaver and Hubbell Bank.
It would also have seemed likely, in light of those experiences, that
the Department of Banking would have been quite vigilant when the
N.D.I.G.C. appeared on the scene, striving mightily to avoid a repeti-
tion of past problems. Neither, as the Commonwealth fiasco demon-
strates, proved to be the case.

More tellingly, this is not an isolated phenomenon. In United
States Brewers' Ass'n v. State, for example, the court held unconsti-
tutional a measure requiring prior approval of a decision to "terminate
a distributorship or establish a new, replacement, or an additional dis-
tributorship in an existing sales territory." The court indicated that
"[t]he legislation in question has two declared purposes: The fostering
and promoting of temperance and obedience to the law, and the pro-
tection of distributors against termination of their franchises without
cause." The court found, as to the second objective, that the mea-
sure imposed unnecessary burdens and carried "little in the way of
standards to guide the commission." The more interesting matter,
for our purposes, was its discussion of the first objective, where the
court found that "[t]here is no reasonable relationship between the act
and the fostering or promoting of temperance and obedience to the
law, and it cannot be justified on that ground."

That, it seemed, was a rather clear signal to the legislature that
those justifications would carry little weight when applied to regula-
tions of that sort. Nevertheless, when the court was asked to parse the
constitutionality of so-called "post and hold" laws ten years later the
resulting case became, as some might say, déjà vu all over again. The
statute, which had been amended in 1979, still contained two ex-
press purposes: temperance and respect for and obedience to the law,

547. Id. at 330, 220 N.W.2d at 547.
548. Id. at 334, 220 N.W.2d at 548. The legislative purposes were codified at Neb. Rev.
Stat. § 53-168.01 (1974), and were apparently "distilled" from the language con-
549. United States Brewers' Ass'n v. State, 192 Neb. 328, 335, 220 N.W.2d 544, 549
(1974).
550. Id. at 334, 220 N.W.2d at 549.
and "promot[ing] an orderly marketing of alcoholic liquor." 552 The court again rejected temperance and respect for the law as valid objectives, at least to the extent that they authorized the restrictions being challenged. 553 With regard to "orderly marketing," the court stated that "[t]he state has not suggested and we cannot conceive of any reason that price-fixing promotes the public health, safety, or welfare, or, for that matter, orderly marketing of liquor." 554 The legislature, getting only a portion of the hint, amended the statutes to remove the offending substantive provisions and to change the declared policies. 555 The language regarding "orderly distribution" was eliminated; the salutary, but constitutionally inconsequential desire to foster "temperance in... consumption and respect for and obedience to the law" remains on the books. 556

Clearly, people do not always learn from their mistakes, and it would itself be a mistake to assume that the sad events that prompted the passage of L.B. 272A could not or would not repeat themselves, a reality that says a great deal about the viability of the Haman court's contention that the open class created by L.B. 272A was "merely theoretical." More tellingly, the intellectual underpinnings for much of what the court held in Haman are, at best, suspect. Bold declarations that the state is not to engage in acts of charity toward bank depositors have a certain allure. Under normal circumstances it would, as was clearly the intent in Weaver, be quite proper to leave those individuals to reap the sad benefits of their tenuous bargain. That impulse was, nevertheless, articulated by a court for reasons the Haman court never discusses and would, presumably, disavow if pressed on the point. The issue is not, as I have stressed, whether or not liberty of contract notions recognized in the first third of this century have any particular degree of validity. Indeed, overtones of that same sort of approach still surface occasionally in the decisions of the court, albeit in not quite the same form. Thus, for example, the court noted that legislative acts at issue in United States Brewers' Ass'n "severely restricted freedom of contract between the parties which existed prior to the enactment of the legislation." 557 The court did not, however, invoke the approach typified in Lochner, Low v. Rees Printing Co., and Wenham, which looked for "exceptional circumstances" to justify government intrusions. It stressed, rather, that the measures were "unreasonable."

554. Id. at 491-92, 351 N.W.2d at 704.
The Haman court may or may not have said that the goals of L.B. 272A were "unreasonable." Its rejection of the avowed legislative purpose arguably depended on the lack of a "substantial" relationship between the goal of public trust and the means selected. That, as I will now explore, may itself represent a "reasonable" conclusion. To the extent it does, however, it injects the court into the process of formulating public policy more intimately, and more intrusively, than it has heretofore been willing to acknowledge. The process by which the court did so was, in my estimation, specious. The question now posed is whether the objective, reached by whatever means, is itself proper.

VII. JUSTIFYING THE RULES: THE HAMAN COURT'S VISION OF JUDICIAL REVIEW

"In that direction," the Unicameral said, waving its right paw round, "lives a Hatter: and in that direction," waving the other paw, "lives a March Hare. Visit either you like: they're both mad."

"But I don't want to go among mad people," the Court remarked.

"Oh, you can't help that," said the Unicameral: "we're all mad here. I'm mad. You're mad."

"How do you know I'm mad?" said the Court.

"You must be," said the Unicameral, "or you wouldn't have come here."558

Judicial review is a necessary evil, tolerated but not necessarily loved because we recognize the greater evils that lurk within us. Alexander Hamilton characterized the judiciary as the branch "least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."559 That statement, which recognized that the judiciary "may truly be said to have neither force nor will, but merely judgment,"560 presupposed the very institution that most often usurps the otherwise legislative function to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated."561

We are told, in no uncertain terms, that "[n]o Legislative act, therefore, contrary to the Constitution, can be valid,"562 that "[a] Constitution is, in fact, and must be regarded by the Judges as a fundamental law,"563 and that it manifestly belongs to the judiciary "to ascertain its

558. ALICE, supra note 1, at 89 (Ch. VI: Pig and Pepper).
560. Id.
561. Id.
562. Id. at 426.
563. Id. at 427.
meaning, as well as the meaning of any particular act proceeding from the Legislative body."\textsuperscript{564} We vest this powerful, quite often antimagoritarian function in the judiciary precisely because we recognize that "trust" is an essential factor in the process of legitimization. We tend to avoid, for example, the election of judges because "there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws."\textsuperscript{565}

We recognize, in turn, that there must be limits on the ability of the people's representatives to structure our affairs for the same reason. It may, for example, be "essential to liberty, that the Government in general should have a common interest[...], an immediate dependence on, and an intimate sympathy with, the people."\textsuperscript{566} There must, nevertheless, be restraints on the ability of a legislature "to aim at an ambitious sacrifice of the many, to the aggrandizement of the few,"\textsuperscript{567} namely "the genius of the whole system" within which a judiciary probes "the nature of just and constitutional laws," in conjunction with "the vigilant and manly spirit which actuates the people of America; a spirit which nourishes freedom and in return is nourished by it."\textsuperscript{568}

All of this should make us comfortable, confident that our affairs are ordered by a delicate balance of "laws" and "justice" with which dispassionate judges meddle, only occasionally, and with manifest reluctance. Unfortunately, as Justice Jackson reminded us, the courts exercising the constitutional prerogative of judicial review "are not final because [they] are infallible, but [... are infallible only because [they] are final."\textsuperscript{569} The specific context of this observation, often overlooked, was the Court's record of reversing a certain percentage of state court decisions in habeas actions. Justice Jackson observed that reversal "reflects a difference in outlook normally found between personnel comprising different courts" and warned that "reversal by a higher court is not proof that justice is thereby better done."\textsuperscript{570} That matrix, presumably, changes when the "reversal" is in fact judicial invalidation of a legislative act on the grounds that it is "repugnant" to the constitution. That, we have been lead to believe (not quite with the infusion of our mother's milk, but it sometimes seems that way), is the natural order of things. Legislatures craft laws, executives implement them, and the courts, and in particular the supreme courts, assure that "constitutional justice" is done. It is also, we are constantly

\textsuperscript{564.} Id. \\
\textsuperscript{565.} Id. at 430. \\
\textsuperscript{568.} Id. at 316. \\
\textsuperscript{570.} Id.
assured, a process within which all doubts are resolved in favor of the legislative act and a measure is stricken only when its constitutional infirmity is patently clear.

A. A Most Dangerous Branch: Public Policy and the Haman Court

Unfortunately, these solemn assurances offer scant immediate comfort to those with the greatest stake in the actual adjudicating, the parties before the court. Implicit within the general requirement that a court hear only “cases and controversies” is the reality that judicial pronouncements on constitutional matters affect the real lives and real interests of real people. And the losing litigants, quite often, find little solace in the notion that a court of final resort has resolved the issues before it with an eye toward the “greater good.” This is especially true where it seems, as is often the case, that “law” has triumphed over “justice.”

Haman is quite clearly one of the most telling recent examples of this phenomenon. Predictably, the court’s pronouncements reignited rather than extinguished the passions that had inhered to the Commonwealth matter. Various parties pronounced the affair closed.571 Others, enraged by the denial of their claims, or embarrassed by the inability of the state to honor what they remained convinced were its just obligations, persevered.572 What the ultimate outcome of these actions will be remains to be seen, at least at this writing. A host of options, some suggestive and some bizarre, have been proposed.573

571. See, e.g., High Court Was on the Money, OMAHA WORLD-HERALD, Mar. 31, 1991, at 12B; Henry J. Cordes, Commonwealth Funds Might Be in Demand, OMAHA WORLD-HERALD, Mar. 30, 1991, at 2, (quoting Sen. Gerald Conway to the effect that “I would find it very difficult for the Lincoln Senators to come up with 25 votes for another scheme.”). An amendment to a 1991 appropriations measure that would have provided $30 million for reimbursement was subsequently defeated on a vote of 25-23, against. See Jason Gertzen, Depositor Repayment Defeated, OMAHA WORLD-HERALD, April 30, 1991, at 9.

572. See, e.g., Jason Gertzen, Lawmaker Fail to Advance Commonwealth Payments, OMAHA WORLD-HERALD, May 16, 1991, at 19 (quoting Senator Loran Schmit: “We hired the help, we were supervising them, and they were thieves. Under those conditions we have no recourse but to honor our commitments.”); Joe Brennan, Commonwealth Fight Goes On, Man Says, OMAHA WORLD-HERALD, Mar. 31, 1991, at 1B); Leslie Boellstorff, Court Gives Depositors Little Room to Appeal, OMAHA WORLD-HERALD, Mar. 30, 1991, at 1, 2 (quoting Senator Landis, “I don’t know what to do next to secure justice.”).

573. The most frequently mentioned choice was to include, in a resolution seeking a constitutional amendment authorizing a state lottery, language allowing some of the proceeds to be earmarked for depositor reimbursement “notwithstanding any other provision of this Constitution.” The various options proposed are detailed in five opinions issued by the Attorney General in the wake of Haman. See Legislative Resolution 24CA; Will Certain Proposed Constitutional Language Allow Payment of Industrial Savings Depositors Out of State Lottery Proceeds?, Op. Neb. Att’y Gen. No. 91051 (June 4, 1991); Constitutionality of Bill Appropriat-
That reality does not, however, mean that we should not examine *Haman* closely in an attempt to learn from that decision. Indeed, *Haman* arguably provides an almost perfect vehicle for a reconsideration of the role of the court and the limits, if any, on judicial review in Nebraska in its wake.

President Jackson is reported to have said, in the aftermath of the second Cherokee case, *Worcester v. Georgia*,574 "[w]ell, John Marshall has made his decision, now let him enforce it."575 Fortunately, sentiments of that sort, while frequently expressed, are largely ignored. Part of the reason is that the individuals who fashion the decisions have both a deep awareness of their role and a respect for the judicial craft. In an address delivered in 1936, while he was still an Associate Justice, Justice Stone observed that "[w]hether the constitutional standard of reasonableness of official action is subjective, that of the judge who must decide, or objective in terms of a considered judgment of what the community may regard as within the limits of the reasonable, are questions which the cases have not specifically decided."576 Those answers were arguably supplied a few short years later in *Olsen*. It is worth noting, however, that Justice Stone characterized the direction in which the Court would proceed in resolving the inquiry as a quest for "the sober second thought of the community, which is the firm base on which all law must ultimately rest."577 Professor Hart, writing some years later, expanded this theme when he observed that the Court's opinions must possess an "underpinning of principle" and be "grounded in reason," given that the Court "does not in the end have the power either in theory or in practice to ram its own personal preferences down other people's throats."578 The Court, he observed, must "be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and dur-
rable principles of constitutional law and impersonal and durable principles for the interpretation of statutes and the resolution of difficult issues of decisional law."\textsuperscript{579}

Those inclined to defend \textit{Haman} can argue, and do so with the utmost sincerity, that the decision is consistent with the sentiments expressed by Justice Stone and Professor Hart. Viewed in this light, \textit{Haman} is the product of "sober second thought" and provides the "voice of reason" in response to the (arguably) political compromise and emotional response to depositor pleas embodied in L.B. 272A. Indeed, viewed in this light the court's decision becomes a quintessential expression of "impersonal and durable principles," dismissing as it does potentially divisive claims for state reimbursement of private losses in light of arguably settled understandings of the limits imposed on legislative action by constitutional provisions.

As we have seen, the actual opinion in \textit{Haman} cannot itself withstand much scrutiny and, as a result, has the potential to greatly undermine rather than enhance our impression of the court and its description and implementation of its role. It is, clearly, one thing for the court to engage in an objective, honest, and dispassionate examination of the constitution, the legislation, and the interpretive matrix within which limits are imposed on legislative enactments. It is quite another to conduct, as the court did, an inquisition, within which the positions espoused by the parties before it are twisted beyond recognition on a judicial rack, and the heretofore applicable rules of decision discarded, modified, or misrepresented in an occasionally unprincipled and never clearly explained manner.

Many will, I am certain, be inclined to characterize these judgments as the sort of vituperation to which law professors are inclined, an exercise in which they can freely engage because the stakes are far less compelling than the adjudication of the real claims of real people.\textsuperscript{580} Nevertheless, it seems to me that the implications of what the court has done in \textit{Haman} for the division of power between and among the various branches of state government in Nebraska are substantial. It is axiomatic that the legislature sets the public policies of the State of Nebraska, and an argument could be made that \textit{Haman} does not disturb that principle. To the extent the doctrine survives, however, it does so in a highly altered form, one within which the realities of what the court is doing belie the explanatory veneer with which they gild the results reached.

L.B. 272A indicated, for example, that the Department of Banking "knew or should have known" of the conditions that led to the demise

\textsuperscript{579} Id.

\textsuperscript{580} Or, as they say, the reason why faculty politics are so vicious is there is so little at stake.
of Commonwealth Savings Company, including the "criminal actions, violations of banking statutes, rules, and regulations, and mismanagement" perpetrated by officers whose actions were subject to departmental review. The legislature also found that departmental orders issued "without regard to whether other industrial companies were solvent . . . caused depositors to lose confidence in industrial companies" so that their assets were "continuously drained" and the companies "forced to merge with or be purchased by other financial institutions or to seek protection by reorganization under Chapter 11 . . ." And, when passed, L.B. 272A had the support of twenty-nine senators who expressed their firm belief, through votes in support of a measure whose contents could hardly be declared alien to them, that:

[T]he Legislature further finds and declares that the circumstances recited . . . have seriously impaired the confidence of the people of this state in the Legislature and in the enactments of the Legislature such as section 21-17,144, the confidence of the people of this state in its financial institutions has been seriously impaired, the welfare and stability of this state and its financial institutions require that the people have confidence in the Legislature and in the financial institutions that are organized pursuant to the enactments of the Legislature, and the redemption of the guaranty to depositors by the Nebraska Depository Institution Guaranty Corporation will serve a necessary public purpose and will effect a sound and necessary public policy.

The focus in Haman, and for that matter much of the public dialogue about that case and Commonwealth in general, has tended to fall almost exclusively on only one of L.B. 272A's goals, redemption of certificates of indebtedness to date incurred and unpaid. The plaintiff, for example, began her discussion of her first proposition of law with a castigation of "[t]he purported justification for the Act . . . set forth in Sections 2 and 3," and then brushed the detailed Legislative findings aside with the assertion that "[t]he Act does nothing more nor less than compensate a specific identifiable and closed class of individuals for losses predating the passage of the Act." This tendency to discount, rather than respond to, the realities of L.B. 272A became even more obvious in her third point, within which she simply refused to credit the motivations of the legislature and its statements, declaring, for example, that "there is nothing in the legislative history of LB 272A to support any such 'finding' that the people of Nebraska have lost confidence or the Legislature or the state's financial institutions,"

The state devoted considerable space in its brief to lengthy extracts from the legislative debate that presented quite a different picture.

582. Id.
583. Id.
585. Id. at 27.
One can, however, leave much of that behind, as a judicial matter, given what appeared to be the traditional approach to statutory interpretation. The court has stressed that when examining "words of ordinary meaning, plain, [and] direct" it will find that "they mean what they say and say what they mean." It had also made it clear that it is supposed to deal with the precise language of the act rather than a fanciful construction of it: "[t]he constitutional validity of an act of the Legislature is to be tested and determined not by what has been or possibly may be done under it, but by what the law authorized to be done under and by virtue of its provisions." Indeed, the obligation to give precise effect to the entire measure means that "[i]t is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." Paraphrasing the words of the court, "[t]he effect of the literal language of [L.B. 272A] is to [make an appropriation to serve a necessary public purpose and ... effect a sound and necessary public policy.]" The court, of course, was under no duty to summarily accept legislative declarations of public policy. As it stressed in *Lenstrom v. Thone*, "[i]t is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts." This role in the fashioning of public policy is both appropriate and essential. It is not, however, unbridled: "to justify a court declaring a statute invalid because its object is not a public purpose, the absence of public purpose must be so clear and palpable as to be immediately perceptible to the reasonable mind." These principles reflect an appropriate reluctance on the part of the court to intrude in legislative matters and, in particular, to second-guess the judgments of the legislature, especially those that reflect policy and are predicated on facts. The court has, accordingly, stressed that "[i]t will be presumed that the legislature acted with a full knowledge of all facts and conditions essential to intelligent legislation." In the specific context of special legislation, it will also "be presumed that the lawmakers based their exception on conditions of which they had knowledge. An unreasonable or arbitrary classification does not appear on the face of the act." To the extent that the judges them-

588. Id. at 4, 136 N.W.2d at 192 (citations omitted).
590. Id. at 789, 311 N.W.2d at 888.
591. Id. at 789-90, 311 N.W.2d at 888 (citation omitted).
selves have doubts about the class created, caution is called for:

[We would not be so confident that, because “no apparent reason” was suggested to the minds of the judges, there could not possibly be a sufficient reason in the minds of the legislators. They are in a better position to know the “conditions and wants” of different classes of population than are the courts.594

Prior to Haman the calculus invoked in the social and economic arenas was that any constitutional “inhibition” must be clear and substantial, and that the statute in question is to be subjected to the lowest or least intense sort of judicial scrutiny: “[m]easures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends.”595 The requirement was not that the court be convinced that the statute is necessary or wise, but that there simply be “some foundation in fact to justify [the] legislative action,” in which case “this court is powerless to substitute its judgment for that of the legislature even if it cared to do so.”596 This was true even when the legislation in question engaged in a retroactive allocation of the benefits and burdens of life in the state. For example, in Chicago, B & Q.R. Co. v. State the court spoke of “burdens designed to promote the safety and welfare of the general public.”597 The court did not, however, indicate that such burdens may only be imposed prospectively, a determination that might have seemed compelled given the court’s use of the “preexisting obligation” rubric in Wakeley. After first stating that “[a] statute does not operate retroactively from the mere fact that it relates to antecedent events,”598 the court found both that the measure in question had retroactive effect and was a valid exercise of the police power:

[T]he single purpose of the legislation, whether contemplating the erection or reconstruction of the viaduct, is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible, and it is not unreasonable to require the parties to maintain the street in a condition of safety, for whose benefit and convenience it was originally rendered unsafe.599

In doing so, the court emphasized a sense of the police power that is of special importance in assessing Haman, stressing the need for “the subordination of private rights to the public welfare, of the individual to the community.”600

597. 47 Neb. 549, 564, 66 N.W. 624, 627 (1896).
598. Id. at 563, 66 N.W. at 627.
599. Id. at 574, 66 N.W. at 630.
600. Id. at 565, 66 N.W. at 627.
In a very real sense, *Haman* represented the complaint of a citizen who did not wish to subordinate her rights to what the legislature had deemed to be the common good. It was obviously her prerogative to question what the legislature had done. But the fact of her disagreement, and for that matter the willingness of the court to agree with it as a personal matter, did not mean that the legislative choice articulated in L.B. 272A was constitutionally improper. This is perhaps one of the reasons why the *Haman* court avoided all discussion of the plaintiff's due process claims and provided no insight into the true implication of *Weaver*. Taken to its logical extreme, the position adopted in *Weaver*, which was in fact the due process position espoused by the plaintiff in *Haman*, would make the simple act of providing *any* public funds to private individuals a violation of due process. That proposition, of course, reaches much too far in a society that has adopted a far more compassionate view of its responsibilities toward others. Accordingly, the contemporary vision of the police power and due process, and in particular what constitutes a valid public purpose, is both more far reaching and gives a truer meaning to the court's longstanding maxim that the wisdom of the act should not be at issue. The rule announced in *Haman* would, presumably, allow the court to reach a different result in cases like *Lennox v. Housing Authority*, in which it accepted legislative “findings” that the establishment of “sanitary and wholesome” low-rent housing projects served a valid public purpose.\(^ {601}\) The same would be true of *State ex rel. Creighton University v. Smith*, where the court accepted the legislature's judgment that “the promotion and search for good health as a benefit to all citizens of Nebraska” through cancer research was a valid public purpose.\(^ {602}\) It would also be quite inconsistent with any number of other decisions, within which the court was willing to both agree with the public policy objective and “finesse” otherwise fatal constitutional prohibitions.\(^ {603}\) As indicated, one of the important elements of those decisions is the fact that the incidental benefit of a particular group was of no moment. Where the “primary purpose and principal objective” of a statute are clear, the reality of indirect benefits will not serve as a basis for its invalidation.\(^ {604}\) As the court has stressed, “[l]egislation which serves a public purpose is not constitutionally impermissible because incidental benefits may accrue to others.”\(^ {605}\)

L.B. 272A expressly declared that it sought to restore public confi-

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601. 137 Neb. 582, 593, 290 N.W. 451, 457 (1940).
dence and that this is a "necessary public purpose and will effect a sound and necessary public policy."\textsuperscript{606} This is significant since, in an admittedly different context—the donation of public funds to charities—the court has stressed that "the test is in the end, not in the means."\textsuperscript{607} Relying on that decision, the court subsequently indicated that:

\begin{quote}
No hard and fast rule can be laid down for determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.\textsuperscript{608}
\end{quote}

In this instance, the "object sought to be accomplished" was the restoration of public trust, with the legislature determining that redemption of the deposits would promote that end. The plaintiff disagreed, but as the court had stressed:

\begin{quote}
In appropriating the public funds, if there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or private purpose, and reasonable means might differ in regard to it, it is generally held that the matter is for the Legislature.\textsuperscript{609}
\end{quote}

Relying on those principles, the court has also approved the transfer of public funds to private entities, such as chambers of commerce, to fund publicity related to industrial development.\textsuperscript{610} The court acknowledged that "particular organizations or individuals" might benefit. It stressed, however, that in light of the overarching public purpose such a "[b]enefit... is only the incidental benefit which generally attaches in most public welfare legislation."\textsuperscript{611} The same phenomenon was evident in the operation of the Nebraska Mortgage Finance Fund Act, which has the practical effect of using the prestige and financial stability of the state, albeit not public funds, to provide the means by which private individuals may secure home mortgages. As the court observed, "[n]ot only is this goal morally right, but from the standpoint of good government it is essential."\textsuperscript{612} The court also discounted any implication that an intent or effect to aid the construction industry factored impermissibly into the Act's passage: "[t]he benefits, if any, to be realized by the building industry are only incidental benefits obtained by providing adequate housing for citizens of the

\textsuperscript{606}. L.B. 272A § 3.
\textsuperscript{607}. United Community Servs. v. Omaha Nat'l Bank, 162 Neb. 786, 800, 77 N.W.2d 576, 587 (1955)(quoting Hager v. Kentucky Children's Home Soc'y, 83 S.W. 605 (Ky. 1904)).
\textsuperscript{609}. Oxnard Beet Sugar Co. v. State, 73 Neb. 66, 67, 105 N.W. 716, 717 (1905).
\textsuperscript{611}. Id. at 847, 241 N.W.2d at 340.
Moreover, the court has also stressed that citizens aggrieved by the determinations made by their elected representatives find their remedy at the polls, rather than in the court:

[The taxation] power has by the people been committed to the discretion of the legislature, and the limits within which it may be exercised depend on, in the absence of express limitations upon such power, upon the exigencies of the public; and, for an abuse of the trust thus imposed, the remedy is an appeal to the public themselves, in the manner ordained by the constitution.614

The need for political redress arises even when the legislative measure is itself discriminatory. For example, in Linenbrink v. Chicago & North Western Railway,615 the court rejected a challenge to a statute imposing liability on a railroad that had not fenced its right of way, allowing two bulls to wander on the tracks and be killed. The railway argued that the result was "harsh" and "discriminatory" since the statute was the product of an era when railways were the dominant form of transportation and did not impose liability on other, now more pervasive carriers. The court conceded that the conditions giving rise to the statute had changed. It stressed, however, that the measure "reflects the legislative policy of the state and if incidental changes in conditions are to be given consideration, it is a change in legislative policy that must be sought and not a judicial holding."616 Indeed, the court itself labors under a similar burden:

Whatever the personal views of this court may be as to the necessity of such legislation, the fact remains that the legislature of the state concluded that a reasonable basis existed for its enactment and, there being some foundation in fact to justify legislative action, this court is powerless to substitute its judgment for that of the legislature even if it cared to do so.617

These were not isolated observations. They depict, rather, a consistent thread in the court's prior treatment of social and economic legislation. The message conveyed, prior to Haman, was that citizens were free to work diligently to prevent the legislature from passing measures like L.B. 272A, an activity the plaintiff in Haman either did not engage in, or, like the many others opposed to that measure, at which she failed. With the passage of L.B. 272A, those individuals were then free to express their disapproval through their votes and political advocacy for change, a process that can clearly be effective, as the defeat of Governor Orr in the last election clearly attests. What those individuals were not arguably free to do was to ask the court to give force to their personal preferences, invalidating a clear expression of public

613. Id. at 461, 283 N.W.2d at 23.
615. 177 Neb. 838, 131 N.W.2d 417 (1964),
616. Id. at 843, 131 N.W.2d at 421.
policy that served a variety of purposes, solely because they and/or the court disagreed with the wisdom of the measure.

The court, in rejecting the claims of a public purpose in L.B. 272A, did three things. It first declared that there was in fact no moral obligation, a decision predicated on a flawed and incomplete exposition of the applicable precedents. It then, even as it attempted to deny that it was doing so, changed the standard of review and invoked heightened scrutiny to give it at least part of the leverage it needed to reach the result it wished to fashion. Finally, it decided for itself that the public purpose articulated in L.B. 272A could not possibly be a valid one, since it would, in the court's estimation, produce precisely the opposite results.

It is this third step, the court's substitution of its vision of the consequences of L.B. 272A for the one articulated by the legislature, that is perhaps the most troubling if the issue is the overall implications of Haman, rather than simply whether the court was right in that case. The impetus for the court's actions can, in some respects, be traced in the plaintiff's brief, where she argued:

If we are to go beyond this, as the State, the Intervenor and the Amicus urge, to grant legislative reimbursement in discharge of moral obligations, the process and end result are completely without definition. What, for example, is the meaning of a moral obligation? How and by whom is it determined that such an obligation exists? From what sources does the obligation spring? When is the moral obligation breached, and by what acts or omissions committed by what persons connected with state government?

The questions are interesting, but they are also largely beside the point. It is, of course, possible to frame an answer to each one, and indeed the court has arguably told us where to find many of them in past decisions. In each instance, however, the court recognized that both the questions and answers had been or should be supplied by the legislature. The court, consistent with its proper role, was confined to simply testing the constitutional propriety of the answer, rather than itself framing the question and then posing the response. This is a distinction of no small importance in a governmental system where the legislature, rather than the courts, frames public policy and articulates public choices. That, as the prior rhetoric of the court indicated, was the system in place in Nebraska. Haman, in large measure, now casts substantial doubt on whether that will again be the case, if in fact it truly ever was.

Ms. Haman also provided a litany of examples, including "after-the-fact reparations to crime victims claiming a failure in the criminal justice system" and "patients claiming a failure of the state in its su-

pervisory authority over physicians.” 619 She concluded with the ob-
servation that “[t]he list is as long as the list of activities and
enterprises subject to state regulation.” 620 That is, of course, precisely
the point. The list of potential moral obligations on the part of the
state is, and in a properly conceived and applied system of justice,
should be exactly “as long as the list of activities and enterprises sub-
ject to state regulation.” The essence of a moral obligation claim is
that sense of outrage, the notion that government has somehow trans-
gressed those boundaries that define fair treatment of citizens and
compassion toward them when their infirmities arise from govern-
ment mis-, mal-, or nonfeasance. Such claims are, as I have indicated,
predicated on overarching notions of justice, rather than the dry ab-
stractions and prickly technicalities of law. They are also entirely con-
sistent with past practices in this state, practices engaged in by the
legislature and approved both tacitly and expressly in cases like those
of George Maurer, injured while on duty with the National
Guard, 621 Joe Murray, improperly incarcerated, 622 and Opal Bredehoft, injured
while under the care and supervision of a state physician. 623

The court’s willingness to pursue the specter raised by the plaintiff,
and itself produce a parade of horrors, is simultaneously commendable
and misguided. Obviously, it stretches the bounds of good government
to create, through a single legislative act, the impression that “every
time someone is injured, the state will rescue him or her.” 624 It is
nevertheless difficult, if not impossible, to see how a decision sus-
taining L.B. 272A could possibly have that purpose or effect. The mea-
ure itself spelled out, in considerable detail, a unique and (hopefully,
anyway) aberrant set of circumstances that combined to produce the
harms to be redressed. If we treat the Commonwealth situation in
that light, it seems doubtful that the state will be called upon to en-
gage in a government bail-out “every time someone is injured.” But
even if it is, the hard reality is that the request will succeed only if the
aggrieved party can convince a majority of the legislature and the gov-
ernor that her cause is just. If she is able to do so, she should in fact
prevail, for that is the essence of government of, by, and for the peo-
ple, and the court’s refusal to accept that reality smacks of judicial
arrogance.

The same observations arise in connection with the court’s warning

619. Id. at 5-6.
620. Id.
621. See supra text accompanying notes 406-09.
622. See supra text accompanying notes 413 and 417.
623. The measure to compensate Ms. Bredehoft, supra note 416, was for the “great
physical pain and suffering” endured as a result of a burn received while she was
a resident of the Nebraska School for the Deaf. L.B. 426, Preamble, 1941 Neb.
Laws 426.
that the "result" of a system within which moral obligations are recognized "could be either economic bankruptcy or economic suffocation through taxation." The first of these is sheer poppycock, as the court well knows. Article XIII, section 1 of the Nebraska Constitution forbids deficit spending, "except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war," conditions that presumably did not factor in the court's analysis in Haman. The court has, accordingly, steadfastly refused to countenance revenue measures that pose even the slightest possibility of debt. Moreover, the statutory mechanisms that structure the state budget process, coupled with the governor's line-item veto power, insure that "bankruptcy" will not occur. The budget recommendations prepared by the governor and submitted to the legislature "shall include a reserve requirement . . . of not less than three percent of the appropriations included in such budget." The tax rates required to sustain the budget actually adopted, in turn, while set by the unicameral, must provide revenue of "not less than three percent nor more than seven percent in excess of the appropriations and express obligations for the biennium for which the appropriations are made." These requirements have "the purpose," and when followed will inevitably have the effect, of "insur[ing] that there shall be maintained in the state treasury an adequate General Fund balance, considering cash flow, to meet the appropriations and express obligations of the state." Indeed, the fact that the leaders of the unicameral must meet twice a year with the tax commissioner to review revenues and rates, coupled with the fact that funds may be appropriated only by legislative act, guarantees that bankruptcy will never occur as a result of decisions made by the unicameral.

The second is potentially distressing and should be avoided, but is also none of the court's business. Determinations regarding both the necessity for and appropriate level of state taxes are the province of the governor and legislature. The members of the court, like any

625. Id.
627. NEB. REV. STAT. § 81-125.01 (1987)(emphasis added).
628. Id. § 77-2715.01(1)(b)(1990).
629. Id.
630. See id. § 77-2715.01(2).
631. See NEB. CONST. art III, § 22. A state warrant may not issue until an appropriation is made for its payment, Fisher v. Marsh, 113 Neb. 153, 203 N.W. 422 (1925), and "continuing" legislative appropriations are prohibited. Rein v. Johnson, 149 Neb. 67, 30 N.W.2d 548 (1947).
632. There is always the possibility that a claim could be lodged that tax rates have become so high that they are confiscatory, a violation of due process. That is both
other citizen, can justly become concerned if the tax rates approach the "suffocation" level. Their redress lies, however, at the polls, and not the bench, a lesson that numerous governors in particular have learned first hand. Indeed, at the risk of repetition, one need look no further than the recent demise of the individual who signed L.B. 272A into law, then Governor now Citizen Orr, to see that the system works quite nicely, thank you.

B. No State is an Island?

The extent to which the court has gone beyond accepted norms can be readily discerned in a (relatively) brief examination of three areas: its treatment of the credit argument, the general national approach to the issue of moral obligation, and the manner in which every other state faced with these problems has apparently responded to them.

1. "The Credit of the State"

The court was, ironically, on perhaps its soundest grounds when it discussed the "claim" that L.B. 272A impermissibly pledged the "credit" of the state.633 The substantive analysis was elegant, yet simple: if, as the parties defending L.B. 272A alleged, the class is open, then any promise to fulfill future claims constitutes an impermissible pledge of the credit of the state. The court explained that the purpose of the applicable constitutional provision, article XIII, section 3, "is to prevent the state or any of its governmental subdivisions from extending the state's credit to private enterprise."634 That, the court stated, "prohibit[s] the state from acting as a surety or guarantor of the debt of another,"635 a situation that would arise if we read L.B. 272A as a declaration that the "state would be forever liable for the losses of industrial company depositors . . . ."636

There are two problems with this. The first is that the court, by ignoring entirely the circumstances under which redemption would occur, seduces the reader herself into forgetting what L.B. 272A is all about. That measure declared that the state would honor N.D.I.G.C.

633. The irony arises from the fact that this issue did not, in any realistic sense, represent a "claim" by the plaintiff. It was, rather, an ancillary observation raised in response to the question of whether L.B. 272A created an open or closed class. See supra text accompanying notes 96-98. The line of analysis the court employed is, in turn, detailed at supra text accompanying notes 99-104.


635. Id. (citing State ex rel. Jardon v. Industrial Dev. Auth., 570 S.W.2d 666 (Mo. 1978)).

636. Id. at 720, 467 N.W.2d at 850.
guaranties because the state was under a moral obligation to do so. Since state laws and state officials were intimately involved in the circumstances leading to the inability of the corporation to meet its responsibilities, state involvement elevated what might otherwise have been a purely private matter to one where redemption "serve[s] a necessary public purpose and will effect a sound and necessary public policy."\(^{637}\) The message of L.B. 272A was then that the state would serve as the "surety or guarantor" of its own "debts of honor." That is, clearly, quite a different matter from a blanket promise to honor any and all future N.D.I.G.C. defaults, a pledge that L.B. 272A most assuredly did not make. This assertion can be easily validated by contrasting L.B. 272A's highly conditional language with, for example, the sort of express promise articulated in Maryland, where the operative statute provides that "[i]t is the policy of this State that funds will be appropriated to the Fund to the extent necessary to protect holders of savings accounts in member associations . . . ."\(^{638}\)

The immediate response to this, which is an argument the court may have anticipated, is "[a]s previously noted, no moral obligation exist[ed]."\(^{639}\) That conclusion is, as I have already demonstrated, predicated on our willingness to accept what proves to be a misleading and incomplete reading of the applicable precedents. But it is interesting to note what happens if we assume, for the sake of argument, that the court's interpretation of \textit{Wakeley} is correct. In light of the court's construction, what is it that L.B. 272A does? The answer is both obvious and devastating for the court's "credit of the state" analysis: L.B. 272A provides \textit{precisely} the sort of "preexisting" notice necessary to establish a valid predicate for future recognition of a moral obligation.

It is also important to understand what the court is trying to say at this juncture of the opinion. The linchpin in the court's analysis is the contention that redemption is a one-sided transaction, providing everything for the depositors and nothing for the state. This position, that the state receives no "valuable consideration," is a necessary aspect of the court's three part, cumulative inquiry. As the court indicates, the test requires not simply that there be credit, but that it be "given" or "loaned" to a private actor. That occurs in the case of L.B. 272A, the court argues, since all the legal claims have been settled or dismissed, no moral obligation existed, and the claims assigned are "relatively worthless."\(^{640}\)

\(^{637}\) L.B. 272A, § 3.


\(^{640}\) \textit{Id.} at 720-21, 467 N.W.2d at 851 (1991). The court does not explain how it reaches the conclusion that the claims are "relatively worthless" or the bases for its judgment that the state "could never come close to receiving an equal amount to the proposed distribution of funds . . . ." \textit{Id.} at 721, 467 N.W.2d at 851. That may be the case, but it is neither certain nor demonstrated by the court.
It is quite likely that the court's premise is wrong; Weimer makes it clear that the depositors are free to pursue alternate claims. The dismissal of American Savings Co., which was a voluntary act by the depositors, presumably does not foreclose that matter from being re-opened. It is also evident that the case the court cites in support of this argument, State v. Wendt, does not fully sustain the court's position. Nothing in Wendt indicates that the Washington court made a judgment that the state could in fact recoup its actual costs. Indeed, the court indicates that the transaction may be "unbalanced," since "in allowing the injured worker to receive any excess recovery above these amounts, the Department receives the indirect, but important, benefit of that individual's cooperation." Moreover, it is quite clear that in Washington State "[t]he public benefit achieved from such activities is the 'consideration' for the funds received." That, in the context of L.B. 272A, means that consideration is in fact present when the measure discharges the public purposes articulated by the unicameral, public purposes with which the court might disagree but with which it is, in a proper exercise of the judicial function, not free to dismiss for that reason, and that reason alone.

But even if what the court asserts is true, it has no bearing on the actual issue, whether a future redemption might provide valuable consideration. That is, after all, precisely what we are talking about here, the future. The court cannot tell us on the one hand that the credit issue arises because the class is open, thus triggering potential future liability, and on the other hand that we should assess whether there will in fact be "valuable consideration" in the future in light of current claims that are somehow "worthless." The court cannot possibly know the value of any future redemption; for that matter, the court cannot possibly know how much money the state would be required to spend. The question, at least to the extent that we are concerned about lending credit, is controlled by events about which we now know nothing and which must be assessed on their own terms, when they arise. The court cannot have it both ways.

Obviously, the court would be on somewhat sounder footing if the situation were as it describes. For example, in Chase v. County of Douglas the court did hold that a provision authorizing localities to

641. See supra text accompanying notes 53-56.
643. Id. at 1339. While the court might not agree, it is likely that almost every other public official in Nebraska would consider "silencing" the Commonwealth depositors very valuable consideration indeed.
issue bonds to finance the purchase of property for industrial development purposes unconstitutionally pledged the credit of the state. The Haman court is then correct to the extent that its discussion of Chase recognizes that the extension of public credit for a purely private use violates the constitution. There is, however, a fundamental difference between the issuance of bonds, which by their very nature pledge future income to retire a debt, and the appropriation of funds, if and when the contingencies that would trigger the appropriation arise. The evil condemned by the court in Chase was, accordingly, two-fold: the bonds created a public debt, a debt that the court characterized as allocating all of the benefits to the private actor and all of the risks to the state.

That brings us to the second major difficulty with the credit analysis, the validity and actual implications of precedents on which the court relies. The Haman court tries to convince us that “[t]he state’s credit is inherently the power to levy taxes and involves the obligation of its general fund.”646 The court cannot possibly be telling us, however, that the “credit” of the state is implicated each time the legislature creates a future obligation in favor of a private individual. Under that theory a host of state programs, each “promising” a particular service or benefit to private individuals, in the future, would be unconstitutional.647 It must, instead, be trying to tell us something about “credit,” which, in the case of L.B. 272A, is at issue: “[t]he stated purpose of the act is redemption of the guarantees of a private corporation to depositors by obligating present and future taxes from the state’s general fund. This is precisely the activity article XIII, § 3, was enacted to prohibit.”648

Yes and no; as the authorities tend to verify, the evil toward which constitutional prohibitions of this sort were directed was the “excesses of the railroad bond era,” a period during which “several state governments filled [a] financial vacuum by lending their credit or borrowing

647. The state’s system of programs for the care and treatment of citizens with mental retardation is, for example, predicated on the legislative declaration that “a pattern of facilities, programs, and services should be available to meet the needs of each person with mental retardation so that a person with mental retardation may have access to facilities, programs, and services best suited to such person throughout his or her life.” Neb. Rev. Stat. § 83-1,141 (1987). Any person attending an existing regional program as of April 16, 1974 “may continue to do so and actual costs shall be contracted and paid to the regions involved.” Id. § 83-1,143.07. The state institution, “[t]he Beatrice State Developmental Center[,] shall provide residential care and humane treatment for those persons with mental retardation who require residential care . . . and shall furnish such training . . . as they may be capable of learning.” Id. § 83-218. These are positive commands and articulate individual, future entitlements, as a matter of public policy.
in order to purchase railroad shares."\(^{649}\) This historical reality, as several courts have stressed, means that the definition of "credit" becomes extraordinarily important. If, for example, the state simply "gives" tax money to private individuals, or authorizes future such obligations, "credit" \textit{per se} is not involved. This is quite clearly the rule in Nebraska since, as one of the cases cited by the \textit{Haman} court makes clear, the simple act of giving public funds to private actors for "eleemosynary" purposes does not violate article XIII, section 3.\(^{650}\) This is true because, as a second case relied on in \textit{Haman} emphasizes, "the constitutional prohibitions noted are not violated when money and property are expended or utilized to accomplish a "public purpose." "\(^{651}\)

The court, possibly anticipating this, argues that "[t]he prohibition against the pledge of the state's credit does not hinge on whether the legislation achieves a 'public purpose,' when the pledge benefits a private individual, association, or corporation."\(^{652}\) This statement follows on the heels of the court's discussion of \textit{Chase} and is curious given that decision's recognition that article XIII, section 3 was not violated in the case of the "publicity" objective \textit{precisely} because a public purpose was served.\(^{653}\) This is, as indicated, the view in Missouri and, for that


\(^{650}\) United Community Servs. v. Omaha Nat'l Bank, 162 Neb. 786, 801, 77 N.W.2d 576, 587 (1956)(sustaining the legislative act authorizing the contributions, acceding to the legislative determination that there is a "public purpose"). The court makes it clear earlier that this is an "eleemosynary" act. \textit{Id.} at 790, 77 N.W.2d at 582.

\(^{651}\) State \textit{ex rel.} Jardon v. Industrial Dev. Auth., 570 S.W.2d 666, 676 (Mo. 1978)(quoting State \textit{ex rel.} Farmers' Elec. Cooper. v. State Envtl. Improvement Auth., 518 S.W.2d 68, 74 (Mo. 1968)). The "public purpose" doctrine has, historically, provided the fulcrum upon which a variety of legislative enactments were determined to be valid. \textit{See generally} Walton H. Hamilton, \textit{Affectation with Public Interest}, 39 YALE L.J. 1089 (1930); Charles M. Kneier, \textit{Municipal Functions and the Law of Public Purpose}, 76 U. PA. L. Rev. 824 (1928); Breck P. McAllister, \textit{Public Purpose in Taxation}, 18 CALIF. L. Rev. 137 (1930).


\(^{653}\) \textit{Chase} v. County of Douglas, 195 Neb. 838, 847, 241 N.W.2d 334, 340 (1976)("It is readily apparent that the benefit of the broad scope of these provisions redounds to the public generally and not to particular organizations or individuals."). The \textit{Haman} court's discussion of \textit{Chase} acknowledges the finding, but not the matrix within which it was framed. The \textit{Chase} court quoted at length from \textit{United Community Services} on this point, stressing that in an article XIII, § 3 inquiry "the test is in the end, not in the means." \textit{Chase} v. County of Douglas, 195 Neb. 838, 847, 241 N.W.2d 334, 340 (1976)(quoting United Community Servs. v. Omaha Nat'l Bank, 162 Neb. 786, 801, 77 N.W.2d 576, 587 (1956)). Ironically, the quotation from
matter, virtually every other jurisdiction. In Washington State, for example, the court in *Wendt* concluded its discussion of "consideration" with the observation that "[e]ven if the expenditures constitute gifts or loans, [the constitution] does not prevent the State from expending money in exercising a 'recognized governmental function.'" That is true because to hold otherwise "would destroy the efficiency of the agencies established by the constitution to carry out the recognized and essential powers of government. It cannot be conceived that the people who framed and adopted the constitution had such consequences in view."

The court, perhaps sensing this, turns to Kentucky for support, citing *McGuffey* v. *Hall*. As the Kentucky court itself acknowledged, however, this is not a universal rule, citing (strangely enough), *Almond* v. *Day*, a Virginia case holding that "[w]hen the underlying and activating purpose of the transaction and the financial obligation are for the state's benefit, there is no loaning of credit." Virginia was, of course, a "persuasive" jurisdiction on the question of what standard governs a special legislation inquiry, and the *Haman* court does not instruct us at this juncture why Virginia decisions are not equally appropriate sources of guidance on the state credit question. That is, however, arguably irrelevant, since the Kentucky court itself subsequently embraced *Almond* as "persuasive," effectively overruling those aspects of *McGuffey* on which the *Haman* court relied. More
tellingly, given the actual holding in McGuffey itself, the validity of the approach was questionable to begin with, at least as applied to the situation created by L.B. 272A. The Kentucky court has stressed that there is a very important exception to the credit bar where a "guaranty arrangement" is implemented through "future appropriations if, as and when made by the legislature out of revenue then currently available to and expendable by it." That of course is precisely what L.B. 272A provided for; future appropriations by the legislature, if and when the corporation is unable to fulfill the deposit guarantees for funds deposited in institutions meeting the very specific conditions spelled out in L.B. 272A.

2. Moral Obligation: A National Perspective

The second inquiry, the general treatment of moral obligation, poses squarely the public policy question. Ironically, many of Justice Cardozo's decisions as a member of the New York Court of Appeals provide an especially appropriate means of establishing this context. In Shaddock v. Schwartz, a 1927 decision, for example, Justice Cardozo considered and rejected an argument predicated on the notion that "in the absence of any statute to the contrary, acceptance by a municipality of the fruits of an invalid contract will not supply the basis for a legal obligation on the footing of a quantum meruit." That is, to use the phrasing employed in Haman, Justice Cardozo refused to accept the argument that there can be no moral obligation where a statute has not previously warned that such an obligation attaches. He observed that the plaintiff's "conception of equity and fairness, the thing demanded by good conscience, is one of a justice unrelieved by tenderness and charity." Justice Cardozo rejected the protesting taxpayer's claim: "We think the council was not limited in its estimate of moral obligation to this Draconian severity. An act is to be viewed, not singly and in vacuo, but in the setting of the whole occasion, if we would judge its moral quality." One year earlier, he laid waste to a second Haman centerpiece, the notion that ignorance of the law is no excuse. In People ex rel. Clark v. Gilchrist, a case dealing with the interpretation of the state income tax law, Justice Cardozo stressed:

condemned the Almond rule as "too broad" and declared that the constitutional provision "does not permit the state's credit to be given or lent for any purpose, public or otherwise." McGuffey v. Hall, 557 S.W.2d 401, 410 (Ky. 1977). Hayes is discussed with approval in Kelly Beers Rouse, Note, Facing the Economic Challenges of the Eighties—the Kentucky Constitution and Hayes v. The State Property and Buildings Commission of Kentucky, 15 N. KY. L. REV. 645 (1988).


660. 158 N.E. 872, 874 (N.Y. 1927).

661. Id.

662. Id.
Returns had been made in reasonable reliance on the comptroller's regulation. If there had been a mistake, it was mistake induced by the agents of the state itself. Taxpayers thus misled had regulated their affairs on the assumption that their tax accounts were closed. To reaudit returns so made might impose a grievous burden. Mistake, even mistake of law, will lay the basis of an equity which lawmakers may heed.663

_Shadock_ and _Clark_ are part of a long line of New York decisions, many written by Justice Cardozo, that recognized the compelling force of moral obligation as a justification for otherwise tenuous legislative acts. That court, by and large, adopted an approach to moral obligation that was consistent with _Wakeley_—properly understood, that is—and, accordingly, at odds with the one set forth in _Haman_. For example, in a case in which many of the same issues that arose in Nebraska, the New York court recognized the authority of the legislature to authorize the court of claims to hear a claim and award, and if appropriate, damages for injuries sustained by a state worker.664 The court observed that "[t]he Legislature ... is not prevented from recognizing claims founded on equity and justice, though they are not such as could have been enforced in a court of law if the state had not been immune from suit."665 One year later the court recognized that the New York Constitution prohibited "[m]ere gifts and benevolences in aid of private undertakings."666 It did not, however, "prohibit the recognition of claims that have their roots in equity and justice."667 "The question," Justice Cardozo wrote, "was for the Legislature whether the equity of compensation was strong enough to merit recognition. We cannot hold it to be illusory."668

One example of a decision that did not recognize the moral obligation, interestingly enough, involved the same issue that initially sidetracked the Montana and Iowa courts, bonuses to veterans. In _People v. Westchester County National Bank_ the court held that the bonus system, which would be funded by bonds, was a "mere gratuity" and impermissibly pledged the credit of the state.669 The court stressed that in every case recognizing a moral obligation "there was the foundation of a claim against the state itself, however imperfect."670 It recognized that "if there is any reasonable ground for the legislative decision that a moral obligation exists, the courts may not intervene."671 That ground, the court determined, was absent, a decision that provoked an eloquent dissent by Justice Cardozo stressing the

663. 153 N.E. 39, 42 (N.Y. 1926).
665. _Id._ at 445.
667. _Id._
668. _Id._
669. 132 N.E. 241 (N.Y. 1921).
670. _Id._ at 246.
671. _Id._ at 247.
"[g]reat achievement and great sacrifice [that] have been meagerly rewarded."672

That view of the proper foundations for moral obligation did not, however, lead the court to reject that predicate in a case that bears a far greater resemblance to the situation in Haman than Cox, the decision the Haman court described as embodying a "factual situation parallel [to] the case at bar."673 In Williamsburgh Savings Bank v. State674 the court recounted the history of a state authorized commission that had issued bonds to fund a flood control project. The bonds were to be funded through assessments levied against the lands benefitted. An "utter collapse of the plan to raise money" ensued, and the court stressed that the claimant

relied upon the facts that this improvement project had been initiated by the state; that it had been approved by a commission acting as an agency of the state, and also by the state itself, and that as represented by the commission there were lands . . . which 'would stand as the security for the payment . . . .'675

The legislature, recognizing this, authorized the bank to prosecute a claim for recovery of its lost funds. The state defended the action by trying to deny that there was any moral obligation. The court indicated that recognition of such claims "is a privilege and not an obligation," and stressed that "[t]he state may, if it prefers, reject the calls of justice, equity, and fair dealing, stand upon its legal rights, and leave the claimant without remedy, and the state alone, through its Legislature, can decide which course it will pursue."676 The court noted that the determination of whether there was a moral obligation was a question of law, and found the obligation existed. It indicated that "[t]he state approved and started on its disastrous course [with] the improvement plan which has become the source of so much trouble."677 The fact that the bonds in question were not a legal obligation of the state was irrelevant; the claim pressed was a moral one, and the court would "not permit it to be said, as a matter of law, that the state is without any moral responsibility for what has happened and that it must stand unresponsive when asked to relieve those whom indirectly at least it has brought into an unhappy predicament . . . ."678

It would take very little to rewrite Williamsburgh Savings Bank to fit the circumstances described by L.B. 272A and then use it to sustain that measure. That would not, contrary to the impression created by Haman, be either an unwarranted act or one out of the mainstream

672. Id. at 248 (Cardozo, J., dissenting).
675. Id. at 60.
676. Id. at 61.
677. Id. at 63.
678. Id.
of judicial thought. Indeed, the response in almost every state that has considered such measures has been overwhelmingly in favor of them, an inquiry framed in many instances within the letter and spirit of the principles articulated by the United States Supreme Court in *Realty Co.*, a decision that the New York courts quoted with approval in most of the cases I have discussed. In that decision the Court observed:

> To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payment to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation.679

Ironically, as part of the process of articulating this principle, the Court felt compelled to stress that the federal government had at least as much authority as those of the states to make such payments. The Court cited a New York decision to the effect that a state "could recognize claims founded in equity and justice in the largest sense of these terms or in gratitude or in charity,"680 and acknowledged that the powers of the federal and state legislatures were "different." Nevertheless, the Court observed, "it is believed that in relation to the power to recognize and to pay obligations resting only upon moral considerations or upon the general principles of right and justice, the Federal Congress stands upon a level with the state legislature."681

The question posed in *Realty Co.* was whether it was proper for Congress to pay certain "bounties" to manufacturers and producers of sugar that were owed pursuant to the Tariff Act of 1890. The Court found that there was a "just debt," a term it defined to "include[s] those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual."682 The Court then stated:

> The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded.683

*Realty Co.* was both a decision predicated on prevalent notions of justice and equity accepted by various state courts and an opinion that itself found an enthusiastic reception in the states once announced.

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680. Id. at 443 (citing Town of Guilford v. Board of Supervisors, 13 N.Y. 143 (1855)).
681. Id.
682. Id. at 440.
683. Id.
However, the reaction was not universally favorable. In Minnesota, for example, the court indicated that Realty Co. “has been very severely criticized” and held that “[a] moral obligation upon the part of the state must have something more substantial than legislation obnoxious to the fundamental law to rest upon—something more for a foundation or starting point than a statute which is itself immoral.” 684

The aspect of Realty Co. on which the decision rested, however, was the question of whether an initial reliance on an unconstitutional statute could give rise to moral obligation. That situation was not present in a case decided the year before in which the court accepted the doctrine of moral obligation and cited Realty Co. to that effect. 685

Other states either rejected the doctrine outright or treated it in such a crabbed manner that it had little practical effect. The Michigan court, for example, bluntly rejected the concept in a sugar bounty case, holding that “[t]his taxation is for no such public purpose that it can be upheld.” 686 The act was, rather, an attempt “to take the property of one citizen, and turn it over to another; to compel one class to donate a part of its property to another.” 687 In Idaho, in a case that echoed many aspects of Weaver, the court considered whether a city could levy a special tax assessment pursuant to a state statute that authorized “municipalities to create a guaranty fund from general taxes levied on the entire municipality, with which to pay deficiencies in special local assessment improvement districts.” 688 The court answered in the negative, rejecting an argument that moral obligation saved the measure. It stated:

There is an equal moral obligation resting on the city as well as a legal and constitutional one to respect and regard the rights of the taxpayer. The bondholder, when he purchased, knew the nature of the security he was purchasing, and its limited value, and it was through no fault of the now additionally burdened payer of the bond obligations that such original security has proved faulty. As pointed out above, the external taxpayer has had no process at all, and the internal, of a limited kind. As to the morals, they are certainly no more than equal as between the bondholder and the taxpayer, and the constitutional safeguards which are entitled to some consideration, as well as the fundamental rights of the taxpayer, are entirely on his side. 689

684. Minnesota Sugar Co. v. Iverson, 97 N.W. 454, 457-58 (Minn. 1903). The sources of these “severe criticisms” are not specified. If the question is one of the judicial reception afforded Realty Co. it is quite clear that the reaction, on balance, was overwhelmingly favorable. Indeed, the one jurisdiction consistently mentioned as hostile, California, eventually changed its posture.

685. City of Minneapolis v. Janney, 90 N.W. 312, 316 (Minn. 1902).


687. Id.


689. Id. at 375-76. The opinion generated a lengthy dissent, within which the dissenting justices stressed that moral obligations had been recognized by the court in the past. Id. at 381 (Leeper, J., dissenting)(citing Gem Irrigation Dist. v. Gallet, 253 P. 128 (Idaho 1927)).
Seven years later, however, the Idaho court resorted "to both law and equity" and rejected a lower court decision refusing to acknowledge a moral obligation, stressing that it did "not appeal to us as a fair minded or equitable justice, conceding (which we do not, nor the contrary) that the statute is unconstitutional."690

Decisions rejecting Realty Co., and the acknowledgment that expenditures in discharge of purely moral obligations, were the exception rather than the rule and, as the Idaho and Minnesota decisions indicate, exceptions that themselves often bred additional exceptions. On balance, Realty Co. was then recognized far more often than not. In Alabama, for example, during the same period that the Nebraska court rejected the concept in Weaver, the court accepted the principle in a number of decisions. In one case decided just months before Weaver, and conjuring up images of Sayre and the unfortunate George Maurer, the court considered "whether an appropriation... from the general treasury of the state, in the satisfaction of a moral obligation to a member of the state militia injured in the line of duty, is a special or private law..."691 The court sustained the measure, stressing that there was a public purpose, quoting from an Arizona decision stating that "'[t]he discharge of such an obligation is merely the performance of a public act, and an appropriation for it is not expending the public funds for a private purpose.'"692 In an interesting side issue that was strangely prophetic of Haman, the court explored "who are those affected whose interest or disinclination may oppose the enactment," answering that "[n]aturally it would be those whose money is appropriated."693 Nevertheless, "[t]he money belongs to all the people of the state, whose representatives are making the appropriation."694 The propriety of such actions, the court emphasized in this and subsequent cases, was largely for the legislature to determine,695 and the constitutional provision against taxing one class of citizens for the private benefit of another "does not mean that it may not be done as a means or incident to a public purpose sought to be accomplished or to satisfy a public duty to that individual."696

In Kentucky the court observed that "'[t]he Legislature may make an appropriation in recognition of moral or equitable obligations, such as a just man would be likely to recognize in his own affairs, whether

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692. Id. at 163 (quoting Fairfield v. Huntington, 205 P. 814, 818 (Ariz. 1922)).
693. Id. at 162-63. The specific question was whether the act was "local" and therefore required, pursuant to the applicable constitutional provision, publication of the intent to pass the measure.
694. Id. at 163.
695. Board of Revenue & Road Comm'rs v. Puckett, 149 So. 850, 852 (Ala. 1933).
by law he is required to do so or not.” 697 The legislature could not recognize such claims when they were predicated on an initial act that was unconstitutional. 698 But the constitutional prohibition against special legislation, for example, did not prevent the legislature from “right[ing] an individual wrong . . . or for personal injuries or to authorize suits and payment of judgments for such injuries sustained by the tort of an officer or employee of the state.” 699 Connecticut recognized that “[s]tates, as well as individuals, can recognize merely honorary obligations,” and that “[t]he equal protection of the laws is not denied by treating different classes of persons in a different way, if it be [in] a way not inappropriate to the class, and the class be set apart from others on reasonable grounds.” 700 And the Florida court, in a holding that expressed the outer limits of judicial deference, stated that “the power to ascertain and determine the obligations within this class [is] entirely political and legislative.” 701 Illinois, a jurisdiction whose decisions the Haman court found of value, was equally strong in its defense of moral obligation. Unlike many states, it found no problems with a World War I bonus measure, finding that it served a public purpose and that to the extent that moral obligation was argued “it cannot well be doubted that, if it does exist, the state may provide for it.” 702 It held, as a general rule, that moral obligations were proper bases for state appropriations and that the state could provide funds to the widows of legislators, 703 increase the pension benefits paid to the widow of a fireman, 704 increase school teacher annuities, 705 and vali-

697. Board of Educ. v. Talbott, 86 S.W.2d 1059, 1063 (Ky. 1935).
698. Id. at 1065.
699. Department of Fin. v. Dishman, 183 S.W.2d 540, 544 (Ky. 1944).
700. Norwich Gas & Elec. v. City of Norwich, 57 A. 746, 749 (Conn. 1904).
701. Carlton v. Mathews, 137 So. 815, 835 (Fla. 1931). Additional decisions recognizing moral obligation include: Opinion of the Justices, 170 A.2d 647 (Me. 1961); Port of Portland v. Reeder, 280 P.2d 324 (Or. 1955); Harbold v. City of Reading, 49 A.2d 817 (Pa. 1946); State for Use & Benefit v. Hobbs, 250 S.W.2d 549 (Tenn. 1952); Watauga Valley Gas Co. v. Evans, 241 S.W.2d 511 (Tenn. 1951); Kilpatrick v. Compensation Claim Bd., 259 S.W. 164 (Tex. Civ. App. 1924); Gross v. Gates, 194 A. 465 (Vt. 1937); Lewis County v. McGeorge, 92 P. 268 (Wash. 1907). A West Virginia decision, State ex rel. Cashman v. Sims, 43 S.E.2d 805 (W. Va. 1947), was one of a long line of cases in that state recognizing the doctrine and prompted an annotation stating that “it is generally recognized that an appropriation of money for payment of the obligations of the state is not an appropriation for private purposes, and such obligation, to be free from constitutional restriction, need not be a legal obligation, but may be a moral obligation.” Annotation, What Constitutes Moral Obligation Justifying Appropriation of Public Moneys for Benefit of an Individual, 172 A.L.R. 1407, 1408 (1948).
date "anticipation warrants." And Justice Holmes, while still on the Massachusetts court, observed that "some latitude is allowed to the legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law."

Perhaps the most compelling formulation of the doctrine, from the perspective of the issues posed in Haman, is found in Indiana. In a decision focusing on the question of taxation for private versus public purposes the court observed:

An exercise of the powers of government may cause injury to particular individuals and, under some circumstances, the moral obligation may be such to justify an exercise of the taxing power in favor of private persons. Such obligations may go beyond the limits of common law liabilities and be such as a just man would recognize in his own affairs, whether by law required to do so or not.

The court defined the moral obligation as arising under circumstances where "some direct benefit was received by the state as a state, or some direct injury . . . suffered by the claimant under circumstances where, in fairness, the state might be asked to respond, and there must be something more than mere gratuity involved." It then stated that there was no "gratuity" involved where a bank had failed and the state sought to reimburse a county for funds lost that had been deposited in compliance with the dictates of a state public depository law. The recognition of the moral obligation, and the concomitant costs associated with it, were proper, the court argued, since "[t]he Legislature may have reasoned that the burden placed upon the taxpayers was necessary and proper to the end that confidence in the government and respect for its courts should not be materially weakened."

These sentiments, which tracked precisely those that impelled L.B. 272A, were even more pronounced in Hanly v. Sims, an earlier case involving Vincennes University, a private institution. The court was asked to assess the constitutionality of an act authorizing the issuance of bonds "'against the state, in full and final settlement of said claim and of all other demands.'" The claims had arisen as a result of a

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707. Earle v. Commonwealth, 63 N.E. 10, 10 (Mass. 1902). This gives me a Holmes and a Cardozo in favor of moral obligation, which (at least in my estimation) is the equivalent of throwing a perfect game (and then some) against the Haman court's Souter. This is, I suppose, the baseball trading card school of judicial review. I mean, who would trade a 1956 Mickey Mantle (MVP, Triple Crown, with a .353 average, 52 homers, and 130 RBIs) for a Jim Pyburn? You can look Pyburn up; he may be a nice man, but to paraphrase Sen. Lloyd Bentsen, "he's no Mickey Mantle."


709. Id.

710. Id.

711. 93 N.E. 228, 228 (Ind. 1910), reh'g denied, 94 N.E. 401 (Ind. 1910).

712. Id. at 228 (quoting 1907 Ind. Acts 497).
series of events involving certain lands granted to the state by Congress for the university. Some of those lands were erroneously sold, and after an initial sequence of legal actions the legislature in 1895 made an appropriation "in full settlement of all claims against the state." The university subsequently sought additional funds, and the act at issue in Hanly resulted. The court considered a variety of arguments against the measure, including a special legislation claim. The court rejected the objections, characterizing the measure as a proper settlement of a debt, a term it defined to include those obligations that "'rest upon a merely equitable or honorary obligation . . . and would not be recoverable in a court of law if existing against an individual.'" In language echoing the strong deference articulated by the Florida court, it stated that "'[i]t was within the province and power of the Legislature to investigate and determine this question for itself, and, when so determined, that conclusion is and should be binding on other coordinate departments of the state government.'" The court then declared:

It is not becoming a sovereign state to weigh its obligations to an injured and helpless subject in an "apothecary's scales." While the state is not required to be generous, nevertheless, it at least ought to be just in its dealings, and it may well set an example of complete justice in making voluntary reparation, long deferred, in a matter involving its honor and fair dealing.

As Haman demonstrates, these sentiments did not prevail in Nebraska, nor was Haman the only instance in which the court was asked to recognize moral obligation within the specific contexts provided by Realty Co.. As indicated, the court was asked by the attorney general during the argument of Weaver to recognize the principles articulated in Realty Co. as a basis for sustaining Chapter 33. The court refused the invitation, and did so without mentioning Realty Co. in either that decision or Hubbell Bank. The reason for that may lie in a much earlier case, Oxnard Beet Sugar Co. v. State, in which the court rejected an attempt to claim a bounty for the manufacture of sugar. The court held that the measure authorizing the appropriation violated the constitutional provision requiring that "[n]o bill shall contain more than one subject and the same shall be clearly expressed in [its] title." The argument was made that this legal infirmity did not serve as an absolute bar to the appropriation, there "still [being] a moral and equitable duty resting upon the Legislature to pay the bounty," a contention that the court acknowledged "seems to receive

713. Id. at 229.
714. Id. at 230 (quoting United States v. Realty Co., 163 U.S. 427, 440 (1896)).
715. Id. at 231.
716. Id.
717. See supra text accompanying notes 506-08.
718. 73 Neb. 57, 102 N.W. 80, reh'g overruled, 73 Neb. 57, 105 N.W. 716 (1905).
719. NEB. CONST. art III, § 14.
some support in the language used by Justice Peckham in Realty Co..720 There was, as indicated, more than "some support" for this proposition since the Court did not consider the potential unconstitutionality of the act creating the moral obligation to be a barrier.721 The Nebraska court, nevertheless, stated:

We are unable to understand any principle either of equity or good conscience that should estop the people of the state of Nebraska by an unauthorized act of the Legislative department of their government, especially when such act is attempted to be enforced in the face of a direct prohibition in the Constitution or basic law adopted by the people. An unconstitutional statute is a legal stillbirth, which neither moves, nor breathes, nor holds out any sign of life. It is a form without one vital spark. It is wholly dead from the moment of its conception, and no right, either legal or equitable, arises from such an inanimate thing.722

The court then, on the request for rehearing, held that the defect could not be cured, at least to the extent that the state could as a matter of public policy appropriate funds for this purpose: "The legislature cannot appropriate the public moneys of the state to encourage private enterprises. The manufacturing of sugar and chicory is a private enterprise and the public money or credit cannot be given or loaned in aid of any individual, association, or corporation carrying on such enterprises."723

Almost the same issue arose just four months prior to the decision in Weaver in Anderson v. Lehmkuhl,724 in which the court held that a measure designed to "validate and cure" certain defects in bonds issued by the First Farmers' Electric District was unconstitutional special legislation. The court found that "this is a special and purely local act, applying only to this particular district, and for that reason, if for no other, is in violation of constitutional restrictions."725 It rejected moral obligation since the law under which the bonds had been issued was itself unconstitutional. While "curative" acts were permissible, "[a] bond or contract which rests on an unconstitutional statute is void and creates no obligation to be enforced by subsequent legislation."726

These decisions are at least somewhat troubling given their apparent rejection of moral obligation as a predicate for retroactive legislation. Each presents, however, certain distinguishing factors that make it arguable whether they in fact constituted a repudiation of the doctrine actually articulated in Wakeley. The first Oxnard opinion is, ul-

721. "We are of the opinion that in either case the appropriations of money in the act of 1895 ... were constitutional and valid." United States v. Realty Co., 163 U.S. 427, 434 (1894).
724. 119 Neb. 451, 229 N.W. 773 (1930).
725. Id. at 460, 229 N.W. at 777.
726. Id. at 461-62, 229 N.W. at 777.
timely, of little bearing since there was no claim in Haman that any of the predicate legislative acts were unconstitutional. The constitutional problem was posed, rather, by L.B. 272A itself and the contention that it constituted special legislation. The second Oxnard opinion is more troubling, since it seems to impose a barrier to the use of public funds for private purposes. That limitation does not, nevertheless, seem to have survived the narrow confines of that decision. As indicated, any number of subsequent cases recognized the ability of the legislature to either compensate or give "gifts" to private individuals or associations. The power to do so, under certain limited circumstances, was recognized even in Cox, a case that did not pose the sort of barriers the Haman court would have had us believe were articulated within it. Anderson, in some respects, comes closest to Haman, given the "closed class" aspects of that decision. The Anderson court rejected an appeal to the rule in Cunningham, repeating the "hard cases make poor law" argument of the dissenting justice in that case. It would be a mistake, however, to read total repudiation of the power of the legislature to aid the electric district into that case, since the court concluded the decision with the observation that "[i]n our opinion the general incorporation laws will permit the organization of a company that will give the relief desired and carry out all obligations of the district, legal [and] moral." Moral obligations could, it seems, be recognized, provided that a special law was not enacted where a general one would suffice.

3. Redemption of Deposits: The Lessons from Other States

This is graphically illustrated by a third reality, the manner in which other states have responded to the demise of state or privately insured banks. At least ten states have experienced situations much like those that surrounded Commonwealth. Three, Kentucky, Tennessee, and Oklahoma, had no state insurance fund while others, like Colorado and Ohio, had sufficient funds in their insurance pools to cover all claims. Still others, while nominally insured, found themselves in circumstances like those that prevailed in Nebraska, creating a need for legislative and legal responses. The legal predicates for the actions and their details have varied; some states completely abolished the guaranty mechanisms, while others reformed them. The pat-

727. See supra text accompanying notes 148-52.
729. They are California, Colorado, Hawaii, Iowa, Kentucky, Maryland, Ohio, Oklahoma, Tennessee, and Utah. The states are listed, and various aspects of their situations described, in Barry Stavro, supra note 6, at 52; and Fred Knapp, Other States Understand Commonwealth Tragedy, SUNDAY JOURNAL-STAR (Lincoln), Oct. 30, 1988, at 1B.
730. Barry Stavro, supra note 6, at 53; Fred Knapp, supra note 729, at 5B.
731. Compare S.B. 119 (Ohio)(abolishing the Guaranty Association), and 1986 Iowa
tern that emerges is, nevertheless, one in which state legislatures have responded in a positive manner and the acts fashioned have either not been challenged or, if attacked, questioned because they did too little, rather than too much.\textsuperscript{732}

For example, in the wake of its industrial crisis Maryland passed a comprehensive reform measure that included a statement that "[i]t is the policy of this State that funds will be appropriated to the [Deposit Insurance] Fund to the extent necessary to protect holders of savings accounts in member associations, and to enable the Fund to meet its obligations under a hardship withdrawal plan or partial distribution of assets."\textsuperscript{733} The state attorney general has issued an opinion concluding that this provision does not unconstitutionally pledge the credit of the state,\textsuperscript{734} and the litigation that has ensued has dealt with the implementation and nuances of the guaranty fund, rather than its constitutionality.\textsuperscript{735} Under the terms of the plan, at least $110 million in tax funds have been paid to depositors.\textsuperscript{736} California, in turn, authorized a state loan guaranty not to exceed $66 million to reimburse losses incurred through the failure of Western Community Loan Center,\textsuperscript{737} stating that "it is in the interest of this state's economy to act to stabilize this financial crisis" and "in the public interest to assist Guaranty Corporation by appropriating money . . . to provide security for a guarantee supporting and securing a loan to Guaranty Corporation or to provide a loan directly to Guaranty Corporation."\textsuperscript{738} The legislature


\textsuperscript{733} The situation in Iowa, which had a guaranty law, see IOWA CODE §§ 536B.1-28 (1991), is worth noting. The Iowa court has rejected three attempts to secure reimbursement in the wake of the failure of the Morris Plan of Iowa. See Eldred v. Merchants Nat'l Bank, 468 N.W.2d 221 (Iowa 1991)(rejecting claim against corporation for breach of fiduciary duty); Eldred v. McCladrey, Hendrickson & Pullen, 468 N.W.2d 218 (Iowa 1991)(rejecting claim against accounting firm for audit misrepresentations); Unertl v. Bezanson, 414 N.W.2d 321 (Iowa 1987)(rejecting claim against corporation, officers and owners). The tenacity of the litigants suggests there will be further actions.


\textsuperscript{737} Fred Knapp, supra note 715.

\textsuperscript{738} 1985 Cal. Stat. 1011, 1024. The provisions are reprinted as a Historical Note to CAL. FIN. CODE § 18023 (West 1989).
made it clear that "the action taken is not in any manner to be construed as a precedent or to imply that the state has any legal obligation to so act now or in the future and . . . is based solely upon the facts, circumstances, and conditions which prevailed at the time of the seizure of Western Community by the commissioner." 739 The action does not appear to have been challenged; had it been, it would have almost certainly been sustained given the line of California cases recognizing the right of the legislature to articulate a public purpose and appropriate public funds to private individuals. 740

The picture that emerges from all of this is of a legislative and judicial landscape whose contours are substantially different from the one sketched in Haman. That decision, both in theory and effect, stands in stark contrast to the holdings of virtually every other court on the issue of moral obligation. It also presages a set of circumstances within which the court has cast itself as a virtual equal partner with the Unicameral in the fashioning of public policy in Nebraska. That is not, the counsel with which this section began notwithstanding, a world where one must be "mad" or they would never have entered to begin with. It is, nevertheless, a world into which the court should venture infrequently, reluctantly, and with a healthy appreciation of the risks it runs. Haman does not, in large measure, reflect a court that is willing to subject itself to such strictures. Nor, for that matter, does it provide a vision of a court that knows how to gracefully leave that world, if indeed it wishes to.

VIII. CONCLUSION

"How are you getting on?" said the Cat, as soon as there was mouth enough for it to speak with.

"I don't think the Court plays at all fairly," the Unicameral began, in a rather complaining tone, "and they all quarrel so dreadfully one can't hear one's self speak—and it doesn't seem to have any rules in particular; at least if there are, nobody attends to them—and you've no idea how confusing it is all the things being alive; for instance, there's the arch I've got to go through next walking about at the other end of the ground—

739. Id.
740. See, e.g., County of Alameda v. Janssen, 106 P.2d 11 (Cal. 1940); City & County of San Francisco v. Collins, 13 P.2d 912 (Cal. 1932); Patrick v. Riley, 287 P. 455 (Cal. 1930); Daggett v. Colgan, 28 P. 51 (Cal. 1891). California had initially been hostile to claims arising from moral obligation, and was often cited as a minority jurisdiction. See, e.g., Mills v. Stewart, 247 P. 332, 335 (Mont. 1926); Oregon Short Line R.R. Co. v. Berg, 16 P.2d 373, 380-81 (Idaho 1932)(Leeper, J., dissenting). Some observers, like Judge Leeper in Oregon Short Line, disputed the characterization, pointing out that the cases were inconsistent. It is clear, nevertheless, that the California court's view has changed.
and I should have croqueted the Court's hedgehog just now, only it ran away when it saw mine coming!"

"How do you like the Court?" said the Cat in a low voice.

"Not at all," said the Unicameral: "it's so extremely—"

Just then she noticed that the Court was close behind it, listening: so she went on "—likely to win, that it's hardly worth while finishing the game." 741

Professor Ely concludes Democracy and Distrust with the observation that "constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can." 742 His theory, that "courts can play a useful role in forcing Congress to perform its constitutionally-contemplated functions," 743 poses risks, since there is a "paradox ... between the call for deference to the considered products of legislatures and the observation that legislative products are frequently unconsidered." 744 Moreover, as he stresses, while it might be true that "[i]f we can just get our legislators to legislate we'll be able to understand their goals well enough," there is also the possibility that while "we may . . . still end up with a fair number of clowns as representatives, . . . at least then it will be because clowns are what we deserve." 745

There is much in Haman that forces us to believe that the court reached its result precisely because it assumed Nebraska's elected representatives could not be trusted. It became, accordingly, the court's obligation to serve as the guardian of the public welfare, to, as it were, "send out the clowns." There is also, to be fair, a strong sense that the court felt it was being asked, one too many times, to approve a p atently transparent legislative attempt to avoid constitutional stric tures. In some instances in the past the measures in question reflected, as the court believed to be the case in Haman, "draftsmanship" that was just a little too "artful." In others, like the liquor license and property tax cases, they showed a legislature either unwilling or unable to discern the import and effect of prior decisions of the court.

There will ultimately be instances where what we or the court might perceive to be legislative density in fact reflects the complexity of the subject; many of the matters on which we expect our representatives to act pose extraordinarily difficult questions. There will also,
all too often, be situations where the legislature is deliberately defying
the court or, more likely, is subservient to the political pipers who oc-
casionally (frequently, in some cases) call the legislative tune. There
is certainly an element of both these impulses in the property tax
cases, a sequence of decisions that was clearly on the court’s mind as it
considered Haman. Indeed, the close congruence between many of
the perspectives found in Haman and those articulated in the various
opinions leading to MAPCO Ammonia Pipeline v. State Board of
Equalization Assessment make it clear that part of the reason L.B.
272A went to its demise was the spill-over effect of one too many at-
ttempts by the Unicameral to avoid its constitutional responsibilities in
the taxation realm.

Quite frankly, there is something very comforting about a court
that is willing, indeed determined, to question closely legislative mo-
tives and to read into the traditional rational basis test an element of
true rationality. There is, at least as I understand the term, nothing
especially “rational” about a constitutional test that finds a picture of
Spuds McKenzie, accompanied by his troika of adoring and usually
scantily clad women, distracting when on the side of a Federal Express
truck, but not a hazard to automobile navigation or pedestrian safety if
displayed on Budweiser’s own vehicles. Yet “rational basis review”
yields precisely that result. In the actual case, Railway Express
Agency, Inc. v. New York, the United States Supreme Court conceded
that “a violation turns not on what kind of advertisements are carried
on trucks but on whose trucks they are carried.”746 The regulation
therefore allowed one entity to do precisely what another was forbid-
den, in the same manner and on the same streets. Guided by the prin-
ciple articulated in Olsen, the Court nevertheless concluded:

The local authorities may well have concluded that those who advertise their
own wares on their trucks do not present the same traffic problem in view of
the nature or extent of the advertising which they use. It would take a degree
of omniscience which we lack to say that such is not the case. If that judgment
is correct, the advertising displays that are exempt have less incidence on traf-
cic than those of appellants.747

Railway Express remains good law; indeed, the Court has made it
clear that in most instances it will not even examine whether the basis
on which it sustains the statute was in fact the motivating factor for its
passage: “Where, as here, there are plausible reasons for Congress’
action, our inquiry is at an end. It is, of course, ‘constitutionally irrele-
vant whether this reasoning in fact underlay the legislative decision,’
. . . because this Court has never insisted that a legislative body articu-
late its reasons for enacting a statute.”748 More tellingly, it has

747. Id. (emphasis added).
748. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980)(quoting Flem-
ing v. Nestor, 363 U.S. 603, 612 (1960))(citation omitted).
stressed that the Court does not have a roving commission to correct the mistakes of its less perceptive elected colleagues: "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."\textsuperscript{749} This would, presumably, be the same outcome in Nebraska, if we take seriously the language of decisions that embrace \textit{Railway Express} and speak of a quest for "any" reasonable legislative motive.\textsuperscript{750}

These were not, however, the principles that impelled the \textit{Haman} decision, and as a matter of judicial one-upmanship there is much that can be said for the world view implied, albeit not for the result or the means by which it was reached. Simply put, scrupulous recognition of the full implications of what we label rational basis review leads, more often than we would care to admit, to absurd results. It is then possible to praise \textit{Haman} if, as the decision seems to indicate, totally unquestioning deference will now be the exception rather than the rule in Nebraska. This would be especially appropriate if one calls into question—as I routinely do—the true motivations of the senators who vote for particular measures. \textit{Haman}, for example, clearly signals that the court will question closely any legislative classification that, while open in theory, is closed in fact. That being the case one can only marvel at legislative actions in the wake of \textit{Haman} that promise special tax credits to specific companies\textsuperscript{751} and at attorney general opinions indicating that such proposals are constitutional.\textsuperscript{752}

Obviously, the "right" result is ultimately a matter of both opinion

\textsuperscript{749}. Vance v. Bradley, 440 U.S. 93, 97 (1979)(footnote omitted).

\textsuperscript{750}. \textit{See}, e.g., State v. Davison, 213 Neb. 173, 177, 328 N.W.2d 206, 209 (1982); Botsch v. Reisdorff, 193 Neb. 165, 174, 226 N.W.2d 121, 128 (1975). In \textit{Botsch} the court, citing \textit{Railway Express}, made it clear that the era within which it might substitute its judgment for that of the legislature "long ago passed into history," Botsch v. Reisdorff, 193 Neb. 165, 176, 226 N.W.2d 121, 128 (1975), and Justice McCown stressed that it was for the legislature, and not the court, to determine if a policy judgment valid in 1931 was to remain in force. \textit{Id.} at 181, 226 N.W.2d at 131 (McCown, J., dissenting in part).


\textsuperscript{752}. Constitutionality of Legislature Act Providing Tax Credits to Producers of Certain Ethanol and Ethanol Coproduct Fuels (LB 754), Op. Neb. Att'y Gen. No. 91047 (1991)(May 24, 1991). The opinion found the measure constitutional as long as there was the possibility of "additional future beneficiaries," a qualification added in the face of a proposed amendment that would limit eligibility to companies whose "final application" had been approved by April 1, 1991. My reading of the opinion leads me to believe that the bill had a very narrow purpose and that a court following the \textit{Haman} doctrine would look beyond the language of the bill to that purpose, even if the offending amendment was not added. It is, of course, irrelevant in some respects whether the court \textit{would} do this; the point is that \textit{Haman} authorizes it to do so.
and circumstance, with judgments about what seems necessary or appropriate changing in the face of new realities. The infamous "switch in time that saved nine" may be fact or fiction; what often matters most in our delicately balanced constitutional system is our perception of courts, justices, and justice, a matrix within which subsequent revelations have no bearing on what we believed to be true at the time. The harsh reality is that the judicial branch often seems no less susceptible to turning a "blind constitutional eye" when the situation appears to warrant it. Thus, the rule in Almond is "too broad" when the issue at hand is malpractice insurance reform, a legislative initiative that may have tread on one too many vested interests.\(^{753}\) It is less troubling, and worthy of embrace, when the question is the location in state of a Toyota plant producing up to 200,000 cars annually and employing up to 3,000 people.\(^{754}\)

The Nebraska court does not seem to fall within this judicial camp. Its treatment of the property tax question, for example, seems to reveal a court wed to its particular constitutional vision regardless of the consequences that its decisions might have for the tax policy and, potentially, economic welfare of the state. That, if indeed it is the impetus for the property tax decisions, is a commendable trait. Nevertheless, there is something deeply troubling about a court that feels it either necessary or appropriate to issue "special releases" on the subject during the course of a legislative session.\(^{755}\) This may be compassionate adjudication, a pronouncement of the court rendered in violation of its own long-standing practices precisely because it wishes to assist senators wrestling with seemingly intractable problems. It may also be hubris, a proclamation on high from judges who believe that elected representatives are incapable of discharging their governance responsibilities and in need of a swift judicial kick. The court's approach in Haman, within which it arrogates the role of protector of the public fisc, suggests it is the latter.

There is, admittedly, a deeper problem with this, since it is often difficult, if not impossible, to determine what the actual legislative motive might be. The recognition of that reality has colored many decisions, just as the willingness to infuse motivations has been a substantial factor in others. We can, accordingly, find a chief justice telling us that a lack of clarity in the legislative history compels deference to the agency charged with administering the act in one in-

\(^{753}\) The reference is to McGuffey v. Hall, 557 S.W.2d 401 (Ky. 1977), discussed at supra text accompanying notes 656-59.

\(^{754}\) That, of course, was the underlying reality in Hayes v. State Property & Bldgs. Comm'n, 731 S.W.2d 797 (Ky. 1987), discussed at supra text accompanying notes 658-59.

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stance, while that same lack of clarity produces quite a different result in another. As a result there is great appeal in the position championed by individuals like Justice Scalia, who urges that we focus exclusively on the text—unless, of course, fidelity to the text stands in the way of the "right" result.

There are, it often seems, as many different approaches to judicial review as there are individuals who write about the subject. The theories espoused, in turn, often exhibit a mind-numbing complexity. My purpose in writing this particular Article was neither to add to the list of alternatives nor embrace or explicate one or more of the current candidates, although "democracy and distrust" is clearly a theme that attracts me. The principle objective was, rather, to reflect on what a particular decision might tell us about judicial review and the judicial craft as currently practiced in Nebraska. My perspective, as I conceded at the outset, is not that of the disinterested observer. I think, nevertheless, that my reaction to Haman would have been a great deal less vituperative if I had been offered an opinion that at least attempted to convey an impression of honest reasoning and an intellectually complete exposition. In my estimation, what we were given in Haman does neither. That, I suspect, may ultimately prove to be the saddest fact of all in the already unfortunate chain of events triggered by Commonwealth’s demise.

So the Court sat on, with closed eyes and half believed itself

756. In Rust v. Sullivan, 111 S. Ct. 1759 (1991), in an opinion by Chief Justice Rehnquist, the Court deferred to the Secretary of Health and Human Service’s revised statutory interpretation and sustained the family planning abortion counseling “gag rule.” The Court found the statutory language and the legislative history “ambiguous” and deferred to the right of the Secretary to change prior rules based on a “reasoned analysis.”

757. In EEOC v. Arabian Am. Oil Co., 111 S. Ct. 1227 (1991), the statutory language relied on by the agency to reach its interpretation that Title VII applies outside the United States was also “ambiguous.” But, the Chief Justice observed, the EEOC “offers no basis in experience for the change” at issue, and that interpretation was “neither contemporaneous with [the statute’s] enactment nor consistent since the statute came into law.” Id. at 1235.

758. In the EEOC case Justice Scalia concurred in the judgment but disagreed with the conclusion that the agency was “not entitled to the deference normally accorded administrative agencies ....” Id. at 1237 (Scalia, J., concurring in part and concurring in the judgment). But, since deference is not “abdication,” and the agency judgment not “reasonable,” he joined the Court’s judgment. In the abortion counseling case he was notably silent, a silence that was intriguing in light of Justice O’Connor’s well-reasoned dissent arguing that “neither the language nor the history of § 1008 compels the Secretary’s interpretation ....” Rust v. Sullivan, 111 S. Ct. 1759, 1789 (1991)(O’Connor, J., dissenting). A somewhat activist posture seems appropriate, accordingly, when it contributes to the demise of Roe v. Wade, a result that Justice Scalia has argued for. See Webster v. Reproductive Health Servs., 492 U.S. 490, 535 (1989)(Scalia, J., concurring in part and concurring in the judgment).
in Moral Obligation Land, though it knew that it had but to open them again, and all would change to dull reality—the grass would be only rustling in the wind, and the pool rippling to the waving of the reeds—the rattling teacups would change to the clatter of keyboards, and the Queen's shrill cries to the voice of a clerk with a memorandum—and the sneeze of the baby, the shriek of the Gryphon, and all the other queer noises, would change (it knew) to the confused clamour government—while the lowing of appellants in the court room would take the place of the Mock Turtle's heavy sobs.

Lastly, it pictured to itself how its little legislative sister would, in the after-time, be herself a grown-up coordinate branch; and how she would keep, through all her riper years, the simple and loving heart of her childhood; and how she would gather about her other aggrieved citizens, and make their eyes bright and eager with many a strange tale and promise of legislative redress, perhaps even with the dream of Moral Obligation Land of long ago; and how she would feel with all their simple sorrows, and find a pleasure in all their simple joys, remembering her own child-life, and the happy summer days.\textsuperscript{759}

\textsuperscript{759} Alice, supra note 1, at 163-64 (Ch. XII: Alice's Evidence). These lines end Carroll's tale, as they do mine. I suspect his will endure far longer.