1987

Pennsylvania's Political Subdivision Tort Claims Act: Damage Limitations Upheld

Jan Denise Loughran

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Torts Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol32/iss5/6

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
Note

PENNSYLVANIA'S POLITICAL SUBDIVISION TORT CLAIMS ACT: DAMAGE LIMITATIONS UPHELD

I. INTRODUCTION

In 1986, the Pennsylvania Supreme Court decided the case of Smith v. City of Philadelphia. Despite three Pennsylvania constitutional challenges, a majority of the court upheld the limitation on damages recoverable against political subdivisions of the Commonwealth, as set forth in the Political Subdivision Tort Claims Act. The impact of this decision on the private sector, with regard to general tort reform in Pennsylvania, is yet to be determined.

Preserving its own coffers has long been a concern of the state, but evident, too, has been the Commonwealth's commitment to providing free access to the courts and affording the public remedies for legal injuries—due course of the law. In weighing these concerns with

1. 512 Pa. 129, 516 A.2d 306 (1986), appeal dismissed, 107 S. Ct. 1265 (1987). In May 1979, a gas explosion in Philadelphia killed seven people, injured several others and destroyed property. Id. at 132, 516 A.2d at 308. "Forty-four separate actions on behalf of seventy-two claimants were filed for property damage, death and personal injury." Id. Because of a Pennsylvania statute limiting the liability of political subdivisions, the total amount recoverable by all 72 claimants would be $500,000. Id. Smith involved a declaratory judgment action brought by plaintiffs who were injured as a result of a gas explosion in Philadelphia in May 1979. Id. Plaintiffs sought to have the Pennsylvania statute limiting the liability of political subdivisions invalidated as unconstitutional. Id. For a further discussion of the facts of Smith, see infra notes 116-21 and accompanying text.


3. For a discussion of the possible effect of the Smith decision on tort reform in general, see infra note 205 and accompanying text.


6. See id. art. III, § 18. For a discussion of the various interpretations of this provision, see infra notes 91-97 and accompanying text.

(1171)
regard to suits against the Commonwealth, the Pennsylvania courts have for many years favored the former and applied the doctrine of sovereign immunity\(^7\) to shield the Commonwealth from tort liability.

Following the Pennsylvania Supreme Court's abrogation of the doctrine of governmental immunity,\(^8\) as well as the much criticized common-law doctrine of sovereign immunity, the General Assembly responded by enacting the Political Subdivision Tort Claims Act.\(^9\) The Act preserves governmental immunity except in eight explicit areas\(^10\) and caps the amount of damages recoverable in those eight categories.\(^11\)

This Note will examine the three Pennsylvania constitutional provisions which the plaintiffs relied on in Smith to challenge the constitutionality of the Act's damage limitation provision: article I, section 11;\(^12\) article III, section 18;\(^13\) and article III, section 32.\(^14\) Particular emphasis

\(7\). For a discussion of sovereign immunity, see infra notes 16-17 and accompanying text.

\(8\). For a discussion of governmental immunity and its function in Pennsylvania, see infra note 21 and accompanying text.


\(10\). 42 Pa. Cons. Stat. Ann. § 8542(b) (Purdon 1982). This section provides for a waiver of immunity in the following areas: (1) vehicle liability; (2) care, custody or control of personal property; (3) care, custody or control of real property; (4) dangerous condition of trees, traffic controls or street lighting; (5) dangerous condition of utility service facilities; (6) dangerous condition of streets; (7) dangerous condition of sidewalks and (8) care, custody or control of animals. Id.

For a discussion of the arguments raised in favor of sovereign and governmental immunity which have been rejected by the Pennsylvania courts, see infra notes 30, 41-42 and accompanying text.

\(11\). 42 Pa. Cons. Stat. Ann. § 8553(b) (Purdon 1982 & Supp. 1987). The statute provides: "Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed $500,000 in the aggregate." Id.

\(12\). Pa. Const. art. I, § 11. The text of the pertinent provision provides as follows:

All courts shall be open; and every man for an injury done him in his land, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, and in such cases as the Legislature may by law direct.

Id.

\(13\). Id. art. III, § 18. For the text of the pertinent provision, see infra note 93 and accompanying text.

\(14\). Pa. Const. art. III, § 32. Section 32 provides:

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

1. Regulating the affairs of counties, cities, townships, wards, boroughs or school districts;

2. Vacating roads, town plats, streets or alleys;
will be placed on the Pennsylvania courts’ definition of “Commonwealth” in article I, section 11 and on the Smith court’s use of a framers’ intent rationale with regard to article III, section 18. Additionally, this Note will analyze briefly the Smith plaintiffs’ equal protection challenge under both the fourteenth amendment of the United States Constitution\(^\text{15}\) and article III, section 32 of the Pennsylvania Constitution.

### II. BACKGROUND

#### A. The Development of Immunity: Its Common Law Roots

The doctrine of sovereign immunity, adopted by the Commonwealth in 1851 in *O'Connor v. Pittsburgh*\(^\text{16}\) had its origins in the English

3. Locating or changing county seats, erecting new counties or changing county lines;
4. Erecting new townships or boroughs, changing township lines, borough limits or school districts;
5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury;
6. Exempting property from taxation;
7. Regulating labor, trade, mining or manufacturing;
8. Creating corporations, or amending, renewing or extending the charters thereof:

Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

*Id.*

15. U.S. CONST. amend. XIV. The fourteenth amendment provides in pertinent part: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

16. 18 Pa. 187, 189-90 (1851) (first case in Pennsylvania to adopt sovereign immunity; court held that Commonwealth included municipalities).

For an excellent discussion of the doctrine of sovereign immunity in Pennsylvania, see Mayle v. Pennsylvania Dep’t of Highways, 479 Pa. 384, 390-91, 388 A.2d 709, 712 (1978). The *Mayle* court pointed out that although most states would have become bankrupt after the American Revolution without the benefit of sovereign immunity, Pennsylvania continued to permit claims to be brought against it. *Id.* The claims came through the office of the Comptroller General for “services performed, monies advanced, or articles furnished by order of the legislature.” *Id.* (quoting Act of April 13, 1782, Chap. DCCCCLIX § 1, 2 Sm.L. 19 (1810 reprint)). Pennsylvania also granted a right of appeal to the Supreme Court of Pennsylvania. *Id.* But see *Respublica v. Sparhawk*, 1 Dall. 357, 363 (Pa. 1788). In *Respublica*, the court held that the Comptroller General’s power was confined to claims “for services performed, monies advanced, or articles furnished, by order of the Legislature or the Executive Council.” *Id.* Therefore, he had no authority to “adjudge a compensation from the state for damages, which individuals may have suffered in the course of our military operations.” *Id.* (emphasis in original); see also *Black v. Respublicam*, 1 Yeates 139, 142 (Pa. 1792) (court concluded that it was not legislature’s intention to grant Comptroller General authority to settle all claims against state for injuries done to individuals in course of military operations). The court held that the “commonwealth is not responsible for the tortious acts of its officers.” *Black*, 1 Yeates at 141.

Additionally, it is interesting to note that the Pennsylvania legislature did not pass “a resolution calling for a constitutional amendment which would shield the states from suits on their obligations in federal court, and when this
maxim, "the King can do no wrong."  

Under the doctrine, the Commonwealth enjoyed immunity from liability for tortious conduct, except in those areas in which the legislature had consented to suit. This concept of immunity originally protected municipalities, but was soon expanded to protect municipal corporations and quasi-corporations, such as school districts. This expanded protection was later termed "governmental immunity," and evolved to encompass state agencies, amendment was proposed by Congress, Pennsylvania refused to ratify it." Mayle, 479 Pa. at 391, 388 A.2d at 712; see also C.E. Jacob, The Eleventh Amendment & Sovereign Immunity 65-67 & n.99 (1972).

17. See Mayle, 479 Pa. at 387, 388 A.2d at 710. This maxim may have been a misstatement of early English law, but by the time of Henry III, in the mid-13th century, the law provided that the king could not be sued in his own courts without his consent. Id. at 387, 388 A.2d at 710. For another historical viewpoint on sovereign immunity, see James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610, 611 & n.5 (1955). For a discussion of the view that the maxim may have originally meant that the king was not privileged to do wrong, see Biello v. Pennsylvania Liquor Control Bd., 454 Pa. 179, 187-88 n.2, 501 A.2d 849, 855 n.2 (1973) (Nix, J., dissenting). See also Borchard, Government Liability in Tort, 34 Yale L.J., 1, 2 (1924).

As the Pennsylvania Supreme Court has noted, "By the mid eighteenth century, the doctrine that the crown, as the embodiment of the modern state, could not be sued absent its consent had become part of Blackstonian canon." Mayle, 479 Pa. at 387-88 & n.7, 388 A.2d at 710 & n.7; see also L. Jaffe, Judicial Control of Administrative Action 197-99 (1965). In 1865, it was first decided that the "petition of right," which was the manner of suit against the crown, would not be used against the crown to remedy the torts of its servants. Id. at 205 (citing Feather v. The Queen, 6 B. & S. 257, 295, 122 Eng. Rep. 1191, 1205 (Q.B. 1865) (applying maxim that "the King can do no wrong"). For a further discussion of the historical roots of sovereign immunity, see infra note 54.

18. See Mayle, 479 Pa. at 386, 388 A.2d at 710 (1978). For a discussion of the sovereign immunity doctrine as applied in Pennsylvania, see supra note 16 and accompanying text.


Until 1973, Commonwealth and local government immunities were believed to have a common source, whether in common law or constitutional law. Mayle, 479 Pa. at 388 n.8, 388 A.2d at 711 n.8. The doctrines of sovereign and governmental immunities were not disunited until the Pennsylvania Supreme Court decided two cases in 1973. See Brown v. Commonwealth, 455 Pa. 566, 505 A.2d 868 (1973); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973). For a discussion of Brown, see infra note 34 and accompanying text. For a discussion of Ayala, see infra notes 28-32 and accompanying text.

20. See, e.g., Ford v. School Dist., 121 Pa. 543, 545, 15 A. 812 (1888) (school districts should have same degree of liability as that of townships).

21. For a discussion of the historical expansion of immunity, see Mayle, 479 Pa. at 390, 388 A.2d at 711-12; Ayala, 453 Pa. at 588-92, 305 A.2d at 879-81. See also Philadelphia Life Ins. Co. v. Commonwealth, 410 Pa. 571, 576, 190 A.2d 111, 114 (1963) (suits seeking to "compel affirmative action on the part of state officials or to obtain money damages or to recover property from the Commonwealth are within the rule of immunity") (emphasis omitted); Bell Telephone Co. v. Lewis, 313 Pa. 374, 376, 169 A. 571, 571 (1934) (proper remedy to test constitutionality of statute was by way of mandamus proceedings, not by proceedings against governor); Williamsport & Elmira R.R. v. Commonwealth, 35 Pa. 288, 291 (1859) ("The Commonwealth of Pennsylvania cannot be made a
defendant in a suit in equity."'); cf. Dyson v. Attorney-General, 1 K.B. 410, 422 (1911) (Attorney-General is proper defendant because government department is not superior to law).

The historical roots of the governmental immunity doctrine are found in Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788). See Ayala, 453 Pa. at 588, 305 A.2d at 879; see also Parish v. Pitts, 244 Ark. 1239, 1243, 429 S.W.2d 45, 47 (1968) (citing Russell as first case to apply immunity to local units of government); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.2d 11, 15, 163 N.E.2d 89, 91 (1959) (immunity first extended to subdivision of state in Russell), cert. denied, 362 U.S. 968 (1960); W. Keeton, D. Dobbs, R. Keeton & D. Owens, PROSSER AND KEETON ON TORTS § 131, 1032-33 (5th ed. 1984); Borchard, supra note 17; Stason, Governmental Tort Liability Symposium, 29 N.Y.U. L. REV. 1321 (1954).

In Russell, the courts extended immunity to an unincorporated county because of the fear that if suits against such political subdivisions were allowed, there would be a tremendous number of actions. Ayala, 453 Pa. at 588-89, 305 A.2d at 879 (citing Russell, 2 T.R. at 672, 100 Eng. Rep. at 362). The Ayala court was also concerned by the absence of a fund from which to pay damages. Id. at 589, 305 A.2d at 879 (citing Russell at 672, 100 Eng. Rep. at 362). The Russell court had concluded that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." Russell, 2 T.R. at 672, 100 Eng. Rep. at 362.

The immunity of municipal corporations and quasi-corporations may also be traced to an extension of the English maxim, "The King can do no wrong." Id. For a discussion of this maxim, see supra note 17 and accompanying text. Other commentators have asserted that the doctrine of governmental immunity stemmed from the English courts' quandary over the principle of respondeat superior. Id.; see also Jaffe, Suits Against Governments and Officers: Damage Actions, 77 HARV. L. REV. 209, 210 (1963). In his article, the author states:

In short, the source of the "mystery" lay not solely in the doctrine of sovereign immunity. Respondeat superior had caused difficulties as early as the nineteenth century in England, when the question arose whether the King, who by that time could be sued in contract whenever "right should be done," should be held liable for his officers' torts. The courts denied such relief, reasoning that respondeat superior was based on the identity of principal and agent, because the King could not himself commit a tort, the attribution failed for want of a competent principal.

Jaffe, supra, at 210.

Regardless of why the English courts adopted the doctrine, in 1812, a Massachusetts court held that immunity protected an incorporated county from liability for the torts of its employees. Mower v. Leicester, 9 Mass. 247 (1812). Borchard, in his article on governmental liability, stated:

"[T]he Massachusetts court passed judgment for the defendant on the unconvincing ground that the county was a quasi-corporation created by the legislature for purposes of public policy and not voluntarily, like a city, and that as a State agency it was therefore immune. This poorly reasoned decision, based upon a case which contradicts rather than sustains it, has been followed very generally in New England and has become the "common law" of the states of the United States, with few exceptions.

Borchard, supra note 17, at 42.

Pennsylvania adopted the doctrine in Ford v. School Dist., 121 Pa. 543, 15 A. 812 (1888). The Ford court held that school districts are quasi-corporations and, therefore, not liable for the tortious acts of their employees. Id. at 547, 15 A. at 815. After concluding that school districts are agents of the Commonwealth, the Ford court was hesitant to hold the district liable when no fund was earmarked for damages. Id. at 548, 15 A. at 815. Furthermore, the court stated
including state colleges, state hospitals and others. Prior to the
that “individual advantage must give way to the public welfare.” Id. at 549, 15 A. at 815-16.


24. See Garrettson v. Commonwealth, 46 Pa. Commw. 136, 405 A.2d 1146 (1979) (Liquor Control Board is not agency independent of the Commonwealth but is integral part of Commonwealth entitled to sovereign immunity). For cases pertaining to the Pennsylvania Department of Transportation (PennDOT), see, e.g., Patterson v. Wilson, 34 Pa. Commw. 58, 382 A.2d 1000 (1978) (as Commonwealth agency, PennDOT is protected by constitutional grant of immunity); Tokar v. Commonwealth Dep’t of Transp., 29 Pa. Commw. 383, 371 A.2d 537 (1977) (because sovereign immunity is not limited to governmental functions, PennDOT, as Commonwealth agency, is protected by constitutional grant of immunity), rev’d, 480 Pa. 598, 391 A.2d 1046 (reversal due to abrogation of sovereign immunity in Mayle); Trulli v. City of Philadelphia, 23 Pa. Commw. 611, 353 A.2d 502 (1976) (PennDOT, as state agency, is protected by Commonwealth’s sovereign immunity).

Pennsylvania Supreme Court’s decision in *Ayala v. Philadelphia Board of Public Education*25 the Pennsylvania courts had not distinguished between entities entitled to sovereign immunity and those entitled to governmental immunity.26 All state and local agencies were protected by the common-law doctrine of sovereign immunity, which arguably was constitutionally mandated by the second sentence of article I, section 1127 of the Pennsylvania Constitution.

B. *The Abrogation of Immunity*


25. 455 Pa. 584, 305 A.2d 877 (1973) (court abrogated doctrine of governmental immunity). For a discussion of the *Ayala* court’s rationale, see infra notes 29-33 and accompanying text.

26. For a discussion of the evolution of governmental immunity, see supra note 21 and accompanying text.


28. Appellants, William Ayala and William Ayala, Jr., brought an action against the board to recover damages for injuries to William, Jr. *Ayala,* 453 Pa. at 586, 305 A.2d at 878. The 15 year-old student’s arm had to be amputated after it had been caught in a shredding machine in the upholstery class of the Carroll School in Philadelphia. *Id.* Appellants argued that the “school district, through its employees, was negligent in failing to supervise the upholstery class in supplying the machine for use without a proper safety device, in maintaining the machine in a dangerous and defective condition, and in failing to warn the children of the dangerous condition.” *Id.* The Board asserted the defense of governmental immunity. *Id.*
of governmental immunity concluding that liability should attach to those who engage in tortious conduct.\textsuperscript{29} The court rejected all of the policy reasons formerly advanced in favor of the doctrine\textsuperscript{30} and held that there was no rational basis for it.\textsuperscript{31} In particular, the court concluded that the proprietary-governmental distinction was "artificial" and without merit.\textsuperscript{32} Finally, the Ayala court justified its abrogation of the


\textsuperscript{30} Ayala, 453 Pa. at 587, 305 A.2d at 878. The court held "that the doctrine of governmental immunity—long since devoid of any valid justification—is abolished in this Commonwealth." \textit{Id.} First, the court concluded that governmental immunity could not be justified on the basis of some notion of sovereign immunity or because without the doctrine there would be a flood of litigation. \textit{Id.} at 592, 595, 305 A.2d at 881, 882. Secondly, the court rejected the argument that immunity must be retained because the governmental units could not afford to pay the claims. \textit{Id.} at 596, 305 A.2d at 883. The court pointed out that as one of the commentators stated that, "'[t]he force of the "crippling judgment" may be vitiating by self-insurance of commercial insurance.'" \textit{Id.} (quoting David, \textit{Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit,} 6 UCLA L. Rev. 1, 53 (1959)). Furthermore, recognizing that the distinction between a proprietary function and a governmental function was an artificial one, the court denounced it and sought to abolish the doctrine altogether. \textit{Id.} at 598, 305 A.2d at 884. Finally, the court determined that what the court had created, the court could dismantle. \textit{Id.} at 600, 305 A.2d at 885. Moreover, the court rejected the argument that by abolishing the doctrine of governmental immunity, the court would be violating the principle of \textit{stare decisis}. \textit{Id.} at 606, 305 A.2d at 888. Consequently, the court abolished the doctrine. \textit{Id.} at 607, 305 A.2d at 889.

\textsuperscript{31} \textit{Id.} at 592 & 597, 305 A.2d at 881 & 883. The court concluded that "[w]hatever may have been the basis for the inception of the doctrine, it is clear that no public policy considerations presently justify its retention." \textit{Id.} at 592, 305 A.2d at 881.

\textsuperscript{32} \textit{Id.} at 592, 596-97, 305 A.2d at 881, 883-84. For a discussion of the
doctrine by reasoning that since the doctrine had been "judicially imposed," it could "be judicially terminated."33 Emphasizing the difference between the two immunity doctrines, the Pennsylvania Supreme Court, on the same day it decided Ayala, upheld the constitutionality of sovereign immunity, in Brown v. Commonwealth,34 holding that article I, section 11 of the Pennsylvania Constitution35 "compels the conclusion . . . that this Commonwealth's immunity is constitutionally, not judicially, mandated."36 Furthermore, following the court's abrogation of governmental immunity in Ayala, the term "Commonwealth" became more restrictively construed, and courts began to hold that only state entities were protected by sovereign immunity.37

Only five years later, in Mayle v. Pennsylvania Department of Highways,38 the Pennsylvania Supreme Court followed the lead of courts in governmental-proprietary distinction, see Davis, supra note 24, at 774 (distinction between two is unclear, leading to "quagmire that has long plagued the law of municipal corporations"); James, supra note 17, at 622-29 (difficult to distinguish governmental from proprietary functions because criteria are elusive and unsatisfactory; function generally deemed to be governmental and thereby immune from suit if function is performed for public benefit and if the function is one historically performed by government).

33. Ayala, 453 Pa. at 600, 305 A.2d at 885; see also Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 503, 208 A.2d 193, 202 (1965) (rule of charitable immunity is not creation of legislature, so what court "fashioned," it can "dismantle").

34. 453 Pa. 566, 305 A.2d 868 (1973). On August 24, 1969, appellant, Diane Brown, sustained injuries when a National Guard jeep in which she was a passenger, was involved in an accident. Id. The negligence of the driver, a Guardsman, had caused the accident. Id. at 568, 305 A.2d at 868-69. Through her guardian, appellant brought a trespass action against the Commonwealth, seeking damages for her injuries. Id. at 568, 305 A.2d at 869. The Commonwealth filed preliminary objections on the basis of sovereign immunity. Id. The court upheld the validity of the doctrine of sovereign immunity and noted that article I, § 11 provides a "framework within which the Legislature may operate." Id. at 572, 305 A.2d at 870.

35. Pa. Const. art. I, § 11. For the pertinent part of the text of this provision, see supra note 12.

36. Brown, 453 Pa. at 571, 305 A.2d at 870. For a discussion of the interpretation of article I, § 11 as constitutionally mandating sovereign immunity, see infra notes 48-52 and accompanying text.


37. For Pennsylvania cases illustrating this trend, see supra notes 22-24 and accompanying text.

38. 479 Pa. 384, 388 A.2d 709 (1978). Appellant, Jimmy Mayle, brought an action in trespass in the Commonwealth Court against the Pennsylvania Department of Highways for damages sustained by him. Id. at 386, 388 A.2d at 709. Allegedly, Mayle was injured because of the department's negligent maintenance of a public highway. Id. The department claimed immunity from liability under the doctrine of sovereign immunity. Id.
over thirty states\textsuperscript{39} and abolished its doctrine of sovereign immunity.\textsuperscript{40} The \textit{Mayle} court rejected all of the Commonwealth’s arguments in favor of the doctrine,\textsuperscript{41} just as it had done when it abolished the doctrine of governmental immunity in \textit{Ayala}.\textsuperscript{42} The \textit{Mayle} court then determined that sovereign immunity was part of the common law and not constitu-

39. For a discussion of cases from over thirty states which illustrates the demise or partial demise of sovereign immunity by judicial action, see Davis, supra note 24, § 25.00. See also Jones v. State Highway Comm’n, 557 S.W.2d 225, 230 (Mo. 1977) (since defense of sovereign immunity in tort is inapplicable, entity in question may sue and be sued regardless of type of suit brought); Oroz v. Board of County Comm’rs, 575 P.2d 1155, 1158 (Wyo. 1978) (abrogating judicially conferred immunity from tort liability upon counties, municipal corporations, school districts and other governmental subdivisions).

For a critical view of the doctrine, see W. Prosser, \textsc{Handbook on the Law of Torts} § 131, at 970-87 (4th ed. 1971); Borchard, supra note 17, at 129, 229; 36 \textsc{Yale L.J.} 1, 757, 1039 (1927); 28 \textsc{Colum L. Rev.} 577 & 734 (1928) (citing all 8 sections of Borchard’s article on \textit{Governmental Responsibility in Tort}); Van Alstyne, \textit{Governmental Tort Liability: A Decade of Change}, 1966 \textsc{U. Ill. L.F.} 919 (review of decisions from 1957 to 1966, indicating evolution of governmental tort responsibility).


41. \textit{Mayle}, 479 Pa. at 398-99, 388 A.2d at 716 (1978). The Commonwealth argued unsuccessfully that “tort liability could overburden the courts and either bankrupt the Commonwealth or endanger its financial stability.” \textit{Id.} at 394, 388 A.2d at 713. Additionally, the Commonwealth argued that the courts did not have the authority to abolish the doctrine of sovereign immunity since it was constitutionally mandated by article I, § 11 of the Pennsylvania Constitution. \textit{Id.} at 399, 388 A.2d at 716. The court rejected this argument as well, maintaining that the constitution is neutral with regard to sovereign immunity, based on Justice Nix’s dissent in \textit{Biello v. Pennsylvania Liquor Control Bd.}, 454 Pa. 179, 189, 301 A.2d 849, 854 (1973) (Nix, J., dissenting). \textit{Mayle}, 479 Pa. at 400-06, 388 A.2d at 716-19. Additionally, the court rejected the Commonwealth’s argument that because sovereign immunity is so much a part of our judicial history, the principles of \textit{stare decisis} should be applied. \textit{Id.} at 406, 388 A.2d at 720. Specifically, the court concluded that

[w]here we to continue to adhere to the doctrine of sovereign immunity in light of its manifest unfairness and of our current knowledge that the doctrine is non-constitutional, we would be blindly imitating the past, for no reason better than that this was the way justice was administered in the feudal courts of Henry III.

\textit{Id.}

For a discussion of the arguments made and rejected in \textit{Ayala}, see \textit{supra} note 30 and accompanying text.

42. \textit{Mayle}, 479 Pa. at 395-98 & 406, 388 A.2d at 714-16 & 720. The court discussed how it had “recently rejected the government-bankruptcy and flood-of-litigation arguments when [this court] abolished local governmental immunity” in \textit{Ayala}. \textit{Id.} at 395, 388 A.2d at 714.

For a discussion of the \textit{Ayala} court’s rationale for abolishing judicially created governmental immunity, see \textit{supra} note 30 and accompanying text.
tionally mandated, and thereby concluded that the court had the authority to abolish the doctrine. Noting the doctrine's "manifest unfairness," the Pennsylvania Supreme Court exercised its self-proclaimed authority and abolished sovereign immunity in the Commonwealth. Citing numerous public policy concerns, the Commonwealth's highest court had previously rejected governmental immunity, interspousal immunity, parental immunity and charitable immunity.

The relationship between the doctrine of sovereign immunity and the Commonwealth's own constitution has been characterized and recharacterized, based on the Pennsylvania Supreme Court's interpretation of article I, section 11 which provides in pertinent part: "All courts shall be open; and every man for an injury done him in his lands . . . shall have remedy by due course of law. . . . Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." This provision first appeared in the Pennsylvania Constitution in 1790, and was adopted verbatim in the Commonwealth's 1838 and 1873 constitutions. Historically, in an effort to show that sovereign immunity was more than a common-law doctrine, the Commonwealth pointed to article I, section 11 to support its views that, in the absence of legislation permitting the suit, article I, section 11 mandated sovereign immunity. Recently,

43. Mayle, 479 Pa. at 406, 388 A.2d at 719. The Mayle court determined that only in recent years had it regarded article I, § 11 as constitutionally compelling the doctrine of sovereign immunity. Id. at 405, 388 A.2d at 719. Consequently, it ruled that since the doctrine had been judicially created and perpetuated, it could, therefore, be abolished. Id. at 406, 388 A.2d at 719.
44. Id. at 405-06, 388 A.2d at 719-20.
45. Id. at 406, 388 A.2d at 720.
48. Id.
however, a majority of the Pennsylvania Supreme Court concluded that article I, section 11 did not bar judicial abrogation of the sovereign immunity doctrine; rather, the court held that the Pennsylvania Constitution was neutral with regard to the presence or absence of sovereign immunity.\textsuperscript{53}

C. The Legislative Response to the Abrogation of Governmental and Sovereign Immunity

In 1980, the Pennsylvania Legislature responded to the court’s abrogation of both sovereign\textsuperscript{54} and governmental immunity,\textsuperscript{55} by enacting the Sovereign Immunity Act\textsuperscript{56} and the Political Subdivision Tort Claims

\textsuperscript{53} Mayle, 479 Pa. at 400, 388 A.2d at 716; see also Biello v. Pennsylvania Liquor Control Bd., 454 Pa. 179, 189, 301 A.2d 849, 854 (1973) (Nix, J., dissenting) (text varies in A.2d) (“The constitution is . . . neutral—it neither requires nor prohibits sovereign immunity. It merely provides that the presence or absence of sovereign immunity shall be decided in a non-constitutional manner.”). This view is supported by the historical development of sovereign immunity. Pennsylvania courts did not adopt sovereign immunity until 1851 in O’Connor v. Pittsburgh, 18 Pa. 187, 189 (1851). See Mayle, 479 Pa. at 403 & n.69, 388 A.2d at 718 & n.69. The O’Connor court relied neither on the Pennsylvania Constitution nor on legislative acts, but rather adopted a “common-law” rule. 18 Pa. at 189. According to the Mayle court:

The first judicial statement that article I, section 11 of the Constitution embodies the doctrine that the state may not be sued without its consent did not occur until 1934, more than 140 years after the Constitution of 1790, and more than 80 years after judicial adoption of sovereign immunity in Pennsylvania.

\textsuperscript{54} Id. at 404, 388 A.2d at 719 (footnotes omitted); see also Kitto v. Minot Park Dist., 224 N.W.2d 795, 799 (N.D. 1974) (abrogating doctrine of local government immunity despite constitutional provision similar to Pennsylvania Constitution, art. I, § 11 and caselaw supporting view that state and local immunity are constitutionally grounded). The court in Kitto stated: “When other grounds have failed, the state constitutional provision has been thrown into the breach to sustain a crumbling legal concept.” 224 N.W.2d at 799.

\textsuperscript{55} But see Mayle, 479 Pa. at 408, 388 A.2d at 721 (O’Brien J., dissenting). In his dissent in Mayle, Justice O’Brien stated that sovereign immunity, despite its common-law roots, “was elevated to constitutional stature in the Constitution of 1790 and retained in the Constitution of 1873, and has remained in all of the constitutions up to and including today’s constitution.” Id.; accord Brown, 453 Pa. 566, 571, 305 A.2d 868, 870 (1973) (“Article I, section 11 of our Constitution compels the conclusion, however, that this Commonwealth’s immunity is constitutionally, not judicially mandated.”).

\textsuperscript{56} Mayle, 479 Pa. 384, 388 A.2d 709 (1978) (court abolished judicially-created doctrine of sovereign immunity).

\textsuperscript{55} Ayala, 453 Pa. 584, 305 A.2d 877 (1973) (court abolished judicially-created doctrine of governmental immunity).


(a) General rule—Except as otherwise provided in this subchapter, no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa.C.S. § 2310 (relating to sovereign immunity reaffirmed; special waiver) or otherwise.

(b) Federal courts—Nothing contained in this subchapter shall be
Act, respectively.\textsuperscript{57} Although each of the Acts has been challenged on constitutional grounds,\textsuperscript{58} their constitutionality has been upheld.\textsuperscript{59} Additionally, several other state legislatures have responded to the judicial abolition of both sovereign and governmental immunity by enacting immunity acts\textsuperscript{60} similar to those in Pennsylvania.\textsuperscript{61}

construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.

1980, Oct. 5, P.L. 695, No. 142, § 221(1), effective in 60 days.

\textit{Id.}


\textsuperscript{57} The first Political Subdivision Tort Claims Act in Pennsylvania enacted to define the boundaries of liability was codified at PA. STAT. ANN. tit. 53, § 5311.101-103 (Purdon Supp. 1979-80). The present law is codified at 42 PA. CONS. STAT. ANN. §§ 8541-8564 (Purdon 1982 & Supp. 1986). 42 PA. CONS. STAT. ANN. § 8541 (Purdon 1982) provides: "Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." \textit{Id.}


\textsuperscript{58} For a discussion of the constitutional challenges made, see \textit{supra} notes 56-57 and accompanying text.

\textsuperscript{59} For a discussion of the Pennsylvania courts' decisions to uphold the Acts as constitutional, see \textit{supra} notes 56-57 and accompanying text.

\textsuperscript{60} For a discussion of state statutes which have been enacted to revitalize the doctrine of immunity for a state or governmental entity, see \textit{infra} note 130 and accompanying text. The statutes cited limit damages recoverable by tort claimants in suits permissibly brought against those entities.

\textsuperscript{61} For the text of the pertinent provisions of Pennsylvania's Sovereign Im-
D. Interpretation of the Constitutionality of the Political Subdivision Tort Claims Act Prior to Smith v. City of Philadelphia

In Carroll v. County of York, a mother brought wrongful death and survival actions against the county, claiming that the negligence of the York County Detention Home officials, in placing her depressed son in an isolated area, contributed to his death by suicide. In its defense, the county claimed immunity from liability under the provisions of the Political Subdivision Tort Claims Act.

The plaintiff in Carroll challenged the Act's constitutionality, arguing from the first sentence of article I, section 11 of the Pennsylvania Constitution, and asserting that by immunizing the Commonwealth from suits brought by tort victims, the Act shut the courthouse doors on those particular claimants and denied them a "remedy by due course of law." The Carroll court focused on the second sentence of article I, section 11, however, and held that it was within the legislature's authority to grant tort immunity to political subdivisions. In reaching that decision, the court applied the neutrality theory espoused in Mayle, wherein the court interpreted article I, section 11 to support its abrogation of the judicially created rule of sovereign immunity—to justify the legislative response which immunized political subdivisions from tort claims. Next, the Carroll court concluded that because the

---

63. Id. at 365, 437 A.2d at 395. Plaintiff claimed that officials at the detention home knew of her son’s depressed state, as well as his previous suicide attempt, yet placed him in an unsupervised area anyway. Id.
64. For the text of the applicable provisions of the Political Subdivision Tort Claims Act, see infra notes 57 and accompanying text.
66. For the full text of article I, § 11, see supra note 12.
67. Carroll, 496 Pa. at 366, 437 A.2d at 396. Other state constitutions include such remedy clauses. For a discussion of several of these provisions, see infra note 141 and accompanying text.
68. For the full text of article I, § 11, see supra 12.
69. Carroll, 496 Pa. at 366-67, 437 A.2d at 396. The court pointed out that while the framers did not intend to grant immunity to the Commonwealth in article I, § 11, they “intended to allow the Legislature if it desired, to choose cases in which the Commonwealth should be immune.” Id. (citing Mayle, 479 Pa. at 400, 388 A.2d at 717). Furthermore, the court stated that “[s]urely the Legislature’s authority ‘to choose cases in which the Commonwealth should be immune’ encompasses political subdivisions.” Id. at 367, 437 A.2d at 396.
70. For a detailed discussion of the neutrality theory, see supra notes 44 & 53 and accompanying text.
71. For a discussion of the Mayle court’s analysis of article I, section 11, see supra note 44 and accompanying text.
72. Carroll, 496 Pa. at 367, 437 A.2d at 396. The court stated that it was consistent with Mayle to hold that article I, § 11 gives the legislature the authority to grant tort immunity to political subdivisions. Id.
legislature had the authority to select cases in which the Commonwealth had immunity, it also had the authority to choose cases in which political subdivisions had immunity.\textsuperscript{73} Hence, with little more than a cursory look at the article I, section 11 challenge,\textsuperscript{74} the court equated the Commonwealth with political subdivisions\textsuperscript{75} and thereby expanded the legislatively granted immunity from tort claims to political subdivisions.\textsuperscript{76}

In so holding, the court sought to distinguish the facts of \textit{Mayle} and \textit{Ayala} from those in \textit{Carroll}. In addition, the court stressed the fundamental difference between reviewing a judicially-created rule and reviewing a legislative act,\textsuperscript{77} and concluded that it was not the role of the judiciary “to displace a rationally based legislative judgment.”\textsuperscript{78} The \textit{Carroll} majority, however, ignored the fact that in \textit{Mayle} and \textit{Ayala} the Pennsylvania Supreme Court had rejected the argument that there was any rational basis for the judicial rule of immunity.\textsuperscript{79}

The dissent in \textit{Carroll}\textsuperscript{80} pointed out that the court’s recent decisions had indicated that there was no rational basis “for immunities that are strictly status-based.”\textsuperscript{81} In fact once the court in \textit{Mayle} determined that article I, section 11 did not constitutionally establish the doctrine of sovereign immunity, it abrogated the doctrine, holding that there was no public policy reason for retaining it.\textsuperscript{82}

Furthermore, the dissent emphasized that a “political subdivision is most certainly not ‘the Commonwealth.’ ”\textsuperscript{83} To illustrate the point that the court had previously distinguished the “Commonwealth” from local municipalities in its constitutional interpretation,\textsuperscript{84} the dissent discussed

\textsuperscript{73} \textit{Id.} at 367, 437 A.2d at 396. For a further discussion of the court’s conclusion, see \textit{supra} note 70 and accompanying text.

\textsuperscript{74} For a discussion of views contrary to that of the majority’s, see \textit{infra} note 76 and accompanying text.

\textsuperscript{75} \textit{Carroll}, 496 Pa. at 367, 437 A.2d at 396.

\textsuperscript{76} \textit{Id.} at 383, 437 A.2d at 404 (Kauffman, J., dissenting). “Whatever authority this section might give the Legislature to insulate the \textit{Commonwealth}, our decisions clearly establish that it does not extend to political subdivisions.” \textit{Id.} at 383, 437 A.2d at 404-05 (Kauffman, J., dissenting). Justice Kauffman pointed out that, in view of the decisions in \textit{Ayala} and \textit{Brown}, the majority was incorrect in ruling that the reference to “Commonwealth” in article I, \$ 11 includes political subdivisions. \textit{Id.} at 384, 437 A.2d at 405 (Kauffman, J., dissenting).

\textsuperscript{77} \textit{Id.} at 368, 437 A.2d at 396-97.

\textsuperscript{78} \textit{Id.} at 369, 437 A.2d at 397.

\textsuperscript{79} For a discussion of the Pennsylvania Supreme Court’s rejection of the public policy argument for retaining status-based immunities, see \textit{supra} notes 30 & 41 and accompanying text.


\textsuperscript{81} \textit{Id.} at 381, 437 A.2d at 403 (Larsen, J., dissenting).

\textsuperscript{82} \textit{Mayle}, 479 Pa. at 399, 406, 388 A.2d at 716, 719-20. For a discussion of the arguments made regarding the doctrines of sovereign and governmental immunity, pro and con, see \textit{supra} notes 41-42 and accompanying text.

\textsuperscript{83} \textit{Carroll}, 496 Pa. at 380, 437 A.2d at 403 (Larsen, J., dissenting).

\textsuperscript{84} \textit{Id.} (Larsen, J., dissenting).
Brown and Ayala. As the Carroll dissent noted, the court in Brown did not abolish sovereign immunity because it believed that it had been constitutionally established by the language in article I, section 11 referencing the "Commonwealth." Conversely, when the court was presented with the opportunity to review the doctrine of governmental immunity, in Ayala, it abolished governmental immunity. The court determined that municipal corporations and quasi-corporations were not encompassed by the term "Commonwealth," and hence, governmental immunity was a doctrine judicially created, not constitutionally mandated. Given the most recent interpretation of article I, section 11, the dissent concluded that the legislature has the authority to abolish recovery against the state or a municipality or any governmental unit, provided that other constitutional protections are not infringed.

When challenging the constitutionality of a law which limits recovery or abolishes a cause of action, tort victims may argue article III, section 18 of the Pennsylvania Constitution in tandem with article I, section 11. Article III, section 18 provides in pertinent part that "in no . . . cases [except Workmen's Compensation] shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive." Yet despite article III, sec-

85. Brown, 453 Pa. at 571, 305 A.2d at 870.
86. For a discussion of the Ayala court's rationale for abolishing the doctrine of governmental immunity, see supra notes 29-31 and accompanying text.
87. Ayala, 453 Pa. at 607, 305 A.2d at 889. In reaching its conclusion, the court agreed "with Chief Justice Traynor of the California Supreme Court that 'the rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia.'" Id. at 597, 305 A.2d at 883 (citing Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961)).
88. Id. at 607, 305 A.2d at 889. For a list of other states in which courts have judicially abrogated the doctrine of governmental immunity, see supra note 29 and accompanying text.
90. See Carroll, 496 Pa. 363, 437 A.2d 394 (1981). For a discussion of other constitutional provisions which have been used to challenge the constitutionality of the Political Subdivision Tort Claims Act, see infra notes 119-22, 124-28, 164-75, 181-89 and accompanying text.
93. Pa. Const. art. III, § 18. In 1874, article III, § 21 as originally adopted read as follows:
No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and, in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitations of

https://digitalcommons.law.villanova.edu/vlr/vol32/iss5/6
tion 18’s clear and unambiguous language, the Pennsylvania Supreme Court has upheld statutory provisions limiting liability of innkeepers94 and limiting the time for bringing a cause of action—to within 12 years of completion of a project—for negligence in planning, design, supervision or observation of construction.95 Consequently, it is evident that the Pennsylvania Supreme Court has not read article III, section 18 to be an absolute barrier to legislative enactments which abolish recovery in some specific situations.96 The court has been characteristically deferential to the legislature in its attempts to limit recovery in suits brought against the Commonwealth.97

In summary, prior to Smith, the court’s continued deference had been most clearly evidenced by its decision in Carroll to uphold the provision for total immunity from recovery of tort damages set forth in the Political Subdivision Tort Claims Act98 enacted by the General Assembly following the courts’ abrogation of both sovereign and government-

time within which suits may be brought against corporations for injuries to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons and such acts now existing are avoided.


94. See Sherwood v. Elgart, 383 Pa. 110, 113-15, 117 A.2d 899, 901-02 (1955) (statute limiting innkeepers’ liability for personal property placed under his care if such loss or injury is caused by fire not intentionally produced by hotel proprietor, innkeeper or his servants, is constitutional).


97. For examples of cases where the Pennsylvania Supreme Court has been deferential, see supra notes 95-96 and accompanying text. See also Carroll, 496 Pa. 563, 569, 437 A.2d 394, 397 (1981) (“It is not our function to displace a rationally based legislative judgment.”); Brown, 453 Pa. 566, 571, 305 A.2d 868, 870 (1973) (“[I]t falls to the Legislature to determine the circumstances under which immunity may be waived.”); Commonwealth v. Orsatti, 448 Pa. 72, 77-78, 292 A.2d 313, 316 (1972) (state’s consent to contractual suits conditioned on claimant’s timely use of administrative procedure); Meagher v. Commonwealth, 439 Pa. 592, 534, 266 A.2d 684, 685 (1970) (legislature determines which suits may be brought against Commonwealth), cert. denied, 451 U.S. 993 (1971); Bannard v. New York State Natural Gas Corp., 404 Pa. 269, 274, 172 A.2d 306, 309 (1961) (ejection actions against Commonwealth barred absent legislative authorization); Stouffer v. Morrison, 400 Pa. 497, 500-01, 162 A.2d 378, 379 (1960) (without contrary legislative action, municipality protected from tort liability by governmental immunity); Commonwealth v. Berks County, 364 Pa. 447, 449, 72 A.2d 129, 130 (1950) (only legislature may direct by law that suits be brought against Commonwealth).

E. Smith v. City of Philadelphia

Against this background, the Pennsylvania Supreme Court in Smith addressed the following three questions: (1) May the legislature limit recovery under article I, section 11 of the Pennsylvania Constitution, rather than just abolish recovery; (2) May such a limitation be upheld in light of the unambiguous language of article III, section 18; and (3) Is the equal protection clause of article III, section 32 of the Pennsylvania Constitution or the fourteenth amendment of the United States Constitution violated by a legislatively imposed cap on tort damages?102

In Smith, Ruth Smith and two other plaintiffs filed a declaratory judgment action asking the court to declare the Political Subdivision Tort Claims Act’s limitation on damages unconstitutional.103 This action followed the filing of their tort claims for injuries they suffered on May 11, 1979.104 On that date, Ruth Smith and 71 other claimants were injured in an explosion of the Philadelphia Gas Works’ gas lines.105 Seven people were killed, several others were injured, and there was significant property damage.106 Despite the extent of the harm caused by the explosion, the Smith court upheld the constitutionality of the Political Subdivision Tort Claims Act which limited the aggregate recovery to $500,000.107

In Smith, the majority concluded that article I, section 11 of the Pennsylvania Constitution enables the legislature to regulate the manner in which suits may be brought against the Commonwealth.108 In reaching this decision, the court impliedly reaffirmed its position, estab-


100. Immunity is waived in eight explicit areas of liability pursuant to 42 Pa. Cons. Stat. Ann. § 8553(b). For a listing of those areas covered by the statute, see supra note 10.

101. Additionally, in the eight areas wherein liability attaches, the Act limits the aggregate recovery against any political subdivision to $500,000. 42 Pa. Cons. Stat. Ann. § 8553(b) (1982).


103. Id. at 132, 516 A.2d at 308.

104. Id.

105. Id.

106. Id.

107. Id. at 140, 516 A.2d at 312.

108. Id. at 134, 516 A.2d at 309. For a discussion of the Smith majority’s reasoning, see infra notes 121-22 & 126-27 and accompanying text.
lished in Mayle,\textsuperscript{109} that the second sentence of article I, section 11 neither "requires nor prohibits sovereign immunity."\textsuperscript{110} Interpreting

\textsuperscript{109} For a discussion of the court's reasoning in Mayle, see supra notes 40-42 and accompanying text.

\textsuperscript{110} Mayle, 479 Pa. at 400, 388 A.2d at 716. For a discussion of the neutrality theory adopted in Mayle, see supra notes 43, 53 & 141 and accompanying text.

In his dissenting opinion in Smith, Justice Papadakos explained that sentence two of article I, § 11, and the varying views of its relationship to sentence one, have spurred judicial and legislative debates. Smith, 512 Pa. at 144, 516 A.2d at 314 (Papadakos, J., dissenting). In disapproving of the majority's adoption of the neutrality view of article I, § 11 regarding sovereign immunity, Justice Papadakos asserted that the majority's interpretation would eliminate the protection the provision was adopted to preserve. Id. at 148, 516 A.2d at 316 (Papadakos, J., dissenting). Justice Papadakos emphasized that article I of the Pennsylvania Constitution is a declaration of rights of the people, not of the state. Id. (Papadakos, J., dissenting) (quoting Brown, 453 Pa. at 581, 305 A.2d at 875 (Manderino, J., dissenting)). Furthermore, Justice Papadakos asserted that if this reading were taken to its logical extreme, it would permit the legislature to grant immunity to the Commonwealth at will. Id. (Papadakos, J., dissenting). This interpretation, in his view, would require one to construe the permissive language of the second sentence of article I, § 11 "as a qualification of the mandatory limitation placed on the legislative power by the first sentence," thereby eliminating the right to a remedy. Id. at 149, 516 A.2d at 316 (Papadakos, J., dissenting).

Justice Papadakos emphasized that in order to assign to article I, § 11 an accurate interpretation, it must be read in its entirety, as was suggested by Justice Manderino's dissent in Brown. Id. at 145-46, 516 A.2d at 314-15 (Papadakos, J., dissenting) (quoting Brown, 453 Pa. at 582-83, 305 A.2d at 876 (Manderino, J., dissenting)). Justice Manderino stated:

\ldots Section 11 has two sentences and they must be read together.\ldots

The first sentence of Section 11 is unequivocal. It protects everyone—without exception—for all injuries [to] \ldots lands, goods, person or reputation. The first sentence says that everyone shall have remedy by due course of law—it does not say that sometimes there is a remedy and sometimes not. The sentence states that right and justice shall be administered without \ldots denial—it does not say justice can be denied sometimes and sometimes not. The first sentence of Section 11 must be read before proceeding to sentence two, and that first sentence could not have been written in more absolute terms even by one possessing divine rights. Can we possibly destroy the absolutely plain meaning of sentence one by an interpretation of sentence two, which requires a reach outside the people's written constitution. The written constitution contains no mention of immunity for the state—or inherent rights of the state—or inalienable rights of the state—or indefeasible rights of the state. It is thus necessary for the majority to begin its interpretation of sentence two by reaching outside the written constitution. Just where that reach extends, we are not told.

If sentence two of Section 11 can be reasonably interpreted without destroying the clear meaning of sentence one or doing violence to the purpose of the entire Article in which the Section appears, we are bound in the name of reason to so interpret sentence two of Section 11. Brown, 453 Pa. at 582-83, 305 A.2d at 876 (emphasis in original).

The first sentence of article I, § 11 guarantees that everyone with a legal injury will receive a remedy and an opportunity to be heard in an open court. See Commonwealth \textit{ex rel.} Duff \textit{v.} Keenan, 347 Pa. 574, 583, 33 A.2d 244, 249
sentence two and its relationship to sentence one as giving the legislature the power to abolish a cause of action,\(^{111}\) the majority reasoned that, *a fortiori*, the legislature must also possess the authority to limit the amount recoverable in permitted actions.\(^ {112}\) By relying upon the court’s determination in *Carroll*\(^ {113}\) that “Commonwealth” included political subdivisions, the *Smith* majority stated that article I, section 11 should not be read as a constitutional barrier to the legislature’s enactment of a limit on the tort liability of political subdivisions.\(^ {114}\)

\(^{111}\) (1943) (every person has constitutional right “to have ‘justice administered without sale, denial or delay’ ”); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 166 (1853) (article I, § 11 was clearly intended to insure “regular administration of justice between man and man”). According to Justice Papadakos, the purpose of the first sentence is to ensure that the rights of individuals to seek redress for legal injuries are not lessened by government action. Thus, the second sentence must serve as a limit on the legislature’s authority. *Smith*, 512 Pa. at 149, 516 A.2d at 315-16 (Papadakos, J., dissenting). Secondly, Justice Papadakos asserted that the provision is self-executing: it protects the rights of the people without requiring an act of legislation to make it effective. *Id.* at 146-47, 516 A.2d at 315 (Papadakos, J., dissenting). “The use of ‘shall’ indicates that the provisions are effective without legislation.” *Id.* at 147, 516 A.2d at 315 (Papadakos, J., dissenting); see *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 454 Pa. 193, 200, 311 A.2d 588, 592 (1973) (first twenty-six sections of article I limit powers of government to interfere with constitutional rights); *O’Neill v. White*, 343 Pa. 96, 100, 22 A.2d 25, 27 (1941) (quoting *Davis v. Burke*, 179 U.S. 399, 403 (1900)) (“Where a constitutional provision is complete in itself it needs no further legislation to put it in force.”); *Erdman v. Mitchell*, 207 Pa. 79, 91, 56 A.2d 327, 331 (1903) (final clause of article I, “unlike many others in the constitution, needs no affirmative legislation”). Moreover, article I, § 25 states that everything in article I “is excepted out of the general powers by government and shall forever remain inviolate.” *Smith*, 512 Pa. at 147, 516 A.2d at 315 (Papadakos, J., dissenting).

Finally, Justice Papadakos proposed that article I, § 11 merely provided the legislature with the opportunity to determine the manner of handling the cases brought against the Commonwealth. *Smith*, 512 Pa. at 149, 516 A.2d at 316 (Papadakos, J., dissenting). Because the courts have always held that the constitution serves to limit the powers exercised by the legislature and since the people have not written immunity into the constitution, Justice Papadakos concluded that the power to raise the shield of immunity has not been delegated to the General Assembly. *Id.* at 149, 516 A.2d at 316-17 (Papadakos, J., dissenting). “If the power is not specifically delegated by the people, it is withheld and cannot be exercised by the government under the guise of ‘neutrality.’” *Id.* (Papadakos, J., dissenting). Additionally, Justice Papadakos stated that “[t]he limitations on the powers of the Legislature are not to be determined from the general body of law, but from the Constitution itself.” *Id.* at 150, 516 A.2d at 317 (Papadakos, J., dissenting) (citing *Erie & N. E. R.R. v. Casey*, 26 Pa. 287 (1856)). For a discussion of the *Mayle* and *Carroll* courts’ treatment of this issue, see *supra* notes 43-53 & 69-76 and accompanying text.

111. For a discussion of cases finding a similar interpretation, see *supra* notes 105-06 and accompanying text.

112. 512 Pa. at 134, 516 A.2d at 309. For a discussion of the dissent’s view of this reasoning, see *supra* note 124 and accompanying text.

113. For a discussion of the facts and holding of *Carroll*, see *supra* note 69 and accompanying text.

114. 512 Pa. at 134-35, 516 A.2d at 309. Justice Larsen argued in his dis-
Additionally, the majority disagreed with the trial court’s conclusion that article III, section 18 prohibits the legislature from limiting recoverable damages from the Commonwealth or its political subdivisions.\textsuperscript{115} The majority relied on Singer v. Sheppard\textsuperscript{116} as support for its conclusion that “the full scope and meaning of [article III, section 18] should be considered . . . in light of the evil intended to be remedied by its adoption.”\textsuperscript{117} Article III, section 18 was drafted in 1872 and 1873, and adopted in 1874 to prevent powerful private interests from influencing the legislature to limit their liability in negligence actions.\textsuperscript{118} Specifically, the framers were responding to the passage of an 1868 statute which capped tort recoveries in actions against railroads and various common carriers.\textsuperscript{119} Considering the impetus for the adoption of the


\textsuperscript{116} Smith, 512 Pa. at 134, 516 A.2d at 309.

\textsuperscript{117} Smith, 512 Pa. at 135, 516 A.2d at 309 (quoting Singer v. Sheppard, 464 Pa. 387 at 396, 346 A.2d 897 at 901).

\textsuperscript{118} Id.

\textsuperscript{119} The Act of April 4, 1868, P.L. 58; see also T. White, Commentaries on
constitutional provision, the Smith majority opined that article III, section 18 should only be applied to private defendants.\textsuperscript{120} To further substantiate this view, the majority pointed out that the government was immune from suit when the framers formulated this constitutional pro-

\begin{quote}
the Convention to Amend the Constitution of Pennsylvania (1907). The companies that pushed through this protective legislation were viewed by the framers as self-serving overreckers. Smith, 512 Pa. at 135, 516 A.2d at 309.

\textsuperscript{120} Smith, 512 Pa. at 136, 516 A.2d at 309-10. In his dissent, however, Justice Papadakos asserted that the prohibitive language in article III, § 18 was meant to indicate a "clear, unambiguous, mandatory, self-executing restraint on legislative power," without regard to the debates of the Constitutional Convention of 1874. Id. at 151, 516 A.2d at 317 (Papadakos, J., dissenting). Justice Papadakos asserted that the records and commentaries of the debates are interesting, but, nonetheless, irrelevant to interpreting the clearly worded constitutional decree. Id. at 151-52, 516 A.2d at 317-18 (Papadakos, J., dissenting); see, e.g., Commonwealth v. Mann, 5 Watts and Serg. 403 (Pa. 1843); Eakin v. Raub, 12 Serg. and Rawle 330 (1825). Justice Papadakos concluded that it is appropriate to interpret the constitution on the basis of its language. Smith, 512 Pa. at 152, 516 A.2d at 318 (Papadakos, J., dissenting) (quoting Passenger Ry. v. Boudrou, 92 Pa. 475 (1880));

The people have withheld power from the legislature and the courts to deprive them of that remedy, or to circumscribe it so that a jury can only give a pitiful fraction of the damage sustained. Nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, goods or person, fills the measure secured him in the Declaration of Rights. As well might it be attempted to defeat the whole remedy as a part . . . . A limitation of recovery to a sum less than the actual damage is palpably in conflict with the right to remedy by the due course of law.

Passenger Ry., 92 Pa. at 482. According to Justice Papadakos, there is no limitation or exception expressed in the provision, except with regard to workmen's compensation, and none should be read into it. Id. at 152, 516 A.2d at 318 (Papadakos, J., dissenting). He disagreed with the majority's conclusion that at the time article III, § 18 was adopted the Commonwealth was immune from suit. Id. (Papadakos, J., dissenting). To the contrary, he pointed out that in 1874, legislation existed which permitted suits against the Commonwealth and its political subdivisions "in eminent domain cases, for contract breaches . . . . and other matters where the attorney general was authorized to represent the Commonwealth, without a limitation on the damages recoverable." Id. at 152-53, 516 A.2d at 318 (Papadakos, J., dissenting). Additionally, Justice Papadakos found the majority's "immunity" rationale of the nonapplicability of article III, § 18 to be unpersuasive, because it could be used to deny protection of peoples' rights with regard to any action that the framers were not cognizant of in 1874. Id. at 153, 516 A.2d at 318 (Papadakos, J., dissenting). "Actions by or against women, product liability claims, malpractice cases, automobile accidents, nuclear power, gas, and electricity accidents, all unknown to the law in 1874, could be limited by such an interpretation." Id. (Papadakos, J., dissenting). Rather, he asserted that article III, § 18 was a broad mandate "by the people to the Legislature not to interfere with the peoples' right to recover against the source of their legal injury." Id. (Papadakos, J., dissenting). "Article III, Section 18 wiped clean all statutory enactments in conflict with it when the Section became part of the Constitution in 1874 and stands as a bulwark, until the people otherwise direct, against all present and future [acts]." Id. (Papadakos, J., dissenting) (emphasis in original).
vision.121 Consequently, according to the majority, the framers had not intended to bring the government and its entities within the scope of the article III, section 18 prohibition.122

Next, the majority addressed the plaintiffs' assertion that the $500,000 aggregate limit on tort recoveries in claims against Pennsylvania's political subdivisions violated article III, section 32 of the Pennsylvania Constitution123 and the equal protection clause of the fourteenth amendment of the United States Constitution.124 After noting the similarity between the state and federal constitutional equal protection provisions,125 the majority began its analysis with a discussion of the three types of classifications drawn and the standard of review to be applied to each classification in determining the constitutionality of the legislation.126 The majority applied an intermediate level standard of review to plaintiffs' "important" interest in their "right to recovery."127

121. Smith, 512 Pa. at 136, 516 A.2d at 309. According to the court, the argument that article III, § 18 applies to all cases ignores the historical fact that the framers could not have contemplated suits against the government at that time. The Commonwealth and its entities were immune from suit. Id. Others have argued that the general language of article III, § 18 includes private and public defendants, since there was no attempt to make the prohibition more limited. Id. at 135-36, 516 A.2d at 309.

122. Id. The majority emphasized that this section was adopted in order to prevent private parties from unfairly protecting themselves from suit, by influencing the General Assembly. Id. at 136, 516 A.2d at 309-10. For a discussion of the presumption that lawfully-enacted legislation is constitutional, see infra notes 196-97 and accompanying text.

123. Pa. Const. art. III, § 32. For the text of this provision, see supra note 14.


125. Smith, 512 Pa. at 137, 516 A.2d at 310. Pennsylvania courts have treated the two equal protection clauses as the equivalent of one another. For a discussion of this comparison, see infra note 200 and accompanying text.

126. Smith, 512 Pa. at 137-38, 516 A.2d at 310-11. The court reviewed the following classifications and their applicable standards of review: (1) classifications which implicate a "suspect" class or a fundamental right must be shown to further a compelling state interest; (2) classifications involving an "important" though not a fundamental right or a "sensitive" classification are evaluated on the basis of a heightened standard of scrutiny, requiring an important governmental purpose; and (3) classifications including none of the aforementioned are upheld if there is any rational basis for the classification. Id. at 137, 516 A.2d at 311.

127. Id. Relying on the court's decision in James v. Southeastern Pennsylvania Transportation Authority, 505 Pa. 137, 146-47, 477 A.2d 1302, 1306-07 (1984) (although access to courts is not fundamental right because limited by Pennsylvania Constitution, it was "important" interest requiring heightened scrutiny), two members of the Smith court held that an intermediate level standard of review should be applied to plaintiffs' "important" interest in their "right to recovery." Smith, 512 Pa. at 139, 516 A.2d at 311. Two concurring justices, Justices Zappala and Hutchinson, believed that the rational basis test should have been applied, but concurred in the ruling of constitutionality. Id. at 141, 516 A.2d at 312 (Zappala & Hutchinson, JJ., concurring). Several decisions have applied the rational basis test. See, e.g., Germantown Sav. Bank v. City of Philadelphia, 98 Pa. Commw. 508, 512 A.2d 756 (court applied rational basis test and
After concluding that the governmental interest in preserving the public treasury against potentially excessive recoveries in tort was an important one, which was closely related to the statutorily enacted classification, the court held that the Act’s classification scheme was constitutional.  

After concluding that the equal protection challenge to the damage limiting provision of the Political Subdivision Tort Claims Act was without merit, the majority upheld the constitutionality of the Act.  

held that 42 PA. CON. STAT. ANN. § 8553(b) damage limitation provision of Political Subdivision Tort Claims Act was not violative of equal protection, appeal granted, 514 Pa. 632, 523 A.2d 346 (1986); Lyles v. City of Philadelphia, 88 Pa. Commw. 509, 490 A.2d 956 (1985) (court applied rational basis test to claim of denial of economic right to full recovery and upheld constitutionality of tort cap imposed by Sovereign Immunity Act); aff’d, 512 Pa. 322, 516 A.2d 701 (1986); see also Singer v. Sheppard, 464 Pa. 387, 346 A.2d 897 (1975) (court upheld constitutionality of No-Fault Motor Vehicle Insurance Act applying rational basis test without mention of intermediate level of scrutiny).  

128. Smith, 512 Pa. at 140, 516 A.2d at 312. However, dissenting in Smith, Justice Larsen stated that regardless of the standard of review chosen, the classifications created by the Act based solely on the identity and status of the tort-feasor are arbitrary, do not bear a fair and substantial relation to any legitimate state purpose, and deny to the claimants the enjoyment of their civil rights and equal protection of the laws under the state and federal constitutions.  

Id. at 516 A.2d at 314 (Larsen, J., dissenting) (emphasis in original); see Martin v. Unemployment Compensation Bd. of Review, 502 Pa. 282, 308, 466 A.2d 107, 121 (1983) (Larsen, J., dissenting) (role of judiciary is to "scrutinize legislative enactments for classifications which have no rational basis or bear no reasonable relation to legitimate legislative goals."). cert. denied, 466 U.S. 952 (1984).  

In Smith, Justice Papadakos joined Justice Larsen’s dissent, but wrote a separate opinion. 512 Pa. at 144, 516 A.2d at 314 (Papadakos, J., dissenting). Justice Papadakos asserted that there was no rational basis for a damage limitation which provides a different measure of recoverable damages depending on the status of the tort-feasor, whether a private individual or corporation or a political subdivision or the Commonwealth. 512 Pa. at 153, 516 A.2d at 318 (Papadakos, J., dissenting). Distressed that the damage limitation restricts the amount recoverable in a single tortious act, without regard to the number of victims, Justice Papadakos concluded that the damage limitation violated equal protection. Id. at 153, 516 A.2d at 318-19 (Papadakos, J., dissenting).  

129. Smith, 512 Pa. at 140, 516 A.2d at 312.  

130. Id. The following state statutes represent political subdivision tort claims acts which limit damages recoverable by a tort claimant.  

IDAHO  

Section 6-924 of Idaho’s Act provides in pertinent part:  

Every policy or contract of insurance . . . of a governmental entity . . . shall provide that the insured governmental entity or its employee to a limit of not less than . . . ($500,000) for bodily or personal injury, death or property damage or loss as the result of any one (1) occurrence or accident, regardless of the number of persons injured or the number of claimants.  

IDAHO Code § 6-924 (1987 Supp.).  

In addition, Section 6-926 of the Idaho Code provides in pertinent part:  

The combined, aggregate liability of a governmental entity and its employees for damages, costs and attorney fees . . . on account of bodily or personal injury, death, or property damage, or other loss as the result of any one (1) occurrence or accident regardless of the number of
III. Analysis

By concluding that the damages limitation in the Political Subdivisions
persons injured or the number of claimants, shall not exceed and is
limited to . . . ($500,000), unless the governmental entity has purchased . . . liability insurance coverage in excess of said limit, in which event the controlling limit shall be the remaining available proceeds of such insurance . . . The court shall reduce the amount of the award . . . in any case . . . within its jurisdiction so as to reduce said aggregate loss to said applicable statutory limit or to the limit . . . provided by said . . . insurance, if any, whichever was greater.

Id. § 6-926.

For a discussion of the former provision which limited liability to $300,000 to anyone, when more than one party was making a claim, see Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983) (rational basis of recovery limitation was to protect public coffers, and would be upheld unless governmental entity had acquired insurance coverage exceeding that amount). See also Packard v. Joint School Dist. No. 171, 104 Idaho 604, 661 P.2d 770 (1983) ($100,000 recovery limit under Idaho Tort Claims Act was constitutional, because of fair and substantial relationship between limitation and legislative interest in conserving public funds).

KANSAS

Section 75-6105(a) of the Kansas Act provides in pertinent part: "Subject to the provisions of K.S.A. 75-6111, the liability for claims within the scope of this act shall not exceed . . . ($500,000) for any number of claims arising out of a single occurrence or accident." KAN. STAT. ANN. § 75-6105(a) (1984).


MINNESOTA

Section 466.04 of Minnesota's Act provides in pertinent part:
Liability of any municipality on any claim within the scope of sections 466.01 to 466.15 shall not exceed (a) $200,000 when the claim is one for death by wrongful act or omission and $200,000 to any claimant in any other case; (b) $600,000 for any number of claims arising out of a single occurrence.

MINN. STAT. ANN. § 466.04 (West 1987 Supp.).

Section 466.06 of Minnesota's Act provides in pertinent part:
The governing body of any municipality may procure insurance against liability of the municipality and its officers, employees, and agents, including torts specified in section 466.03 for which the municipality is immune from liability. The insurance may provide protection in excess of the limit of liability imposed by section 466.04. . . . The procurement of such insurance constitutes a waiver of the defense of governmental immunity to the extent of the liability stated in the policy but has no effect on the liability of the municipality beyond the coverage so provided.

Id. § 466.06.

For a discussion of the Minnesota Act, see Case Note, Municipal Tort Liability—Kossak v. Stalling, 277 N.W.2d 30 (Minn. 1979), 6 WM. MITCHELL L. REV. 490 (1980).

For the text of statutes which limit recoverable tort damages to a legislatively determined limit, see, e.g., FLA. STAT. ANN. 45 § 768.28(5) (West 1986); IND. CODE §§ 34-4-16.5-3, -4 (West 1983 & 1986 Supp.); OKLA. STAT. ANN. tit. 51, § 154 (West 1987 Supp.); OR. REV. STAT. § 30.270 (1975).
Section 768.28(1) of Florida’s Act provides in pertinent part: “In accordance with § 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this Act.” Fla. Stat. Ann. § 768.28(1) (West 1986).

Section 768.28(5) of Florida’s Act provides in pertinent part:

The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim . . . which, when totalled with all other claims . . . paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000.

Id. § 768.28(5).


INDIANA Section 34-4-16.5-3 of Indiana’s Act provides in pertinent part: “A governmental entity or an employee acting within the scope of his employment is not liable if a loss results from: (1)-(15).” IND. CODE § 34-4-16.5-3 (West 1983 and 1986 Supp.).

Section 34-4-16.5-4 of Indiana’s Act provides in pertinent part: The combined aggregate liability of all governmental and all public employees, acting within the scope of their employment and not excluded from liability under section 3 of this chapter, does not exceed . . . ($300,000) for injury to or death of one (1) person in any one (1) occurrence and does not exceed . . . ($5,000,000) for injury to or death of all persons in that occurrence. A governmental entity is not liable for punitive damages.

Id. § 34-4-16.5-4.

For a discussion of the policy underlying the Indiana Tort Claims Act, see Board of Comm’rs of Hendricks County v. King, 481 N.E.2d 1327 (Ind. Ct. App. 1985) (policy of Act is to protect public officials from harassment by threats of civil suit for decisions made within scope of employment and to limit tort damages and protect fiscal integrity of governmental entities).

OKLAHOMA

Section 154.A. of Oklahoma’s Act provides in pertinent part: The total liability of the state and its political subdivisions on claims within the scope of this act arising out of an accident or occurrence happening after the effective date of the Act shall not exceed:

1. . . .($25,000) for any claim or to any claimant who has more than one claim for loss of property arising out of a single accident or occurrence;

2. . . .($100,000) to any claimant for his claim for any other loss arising out of a single accident or occurrence except however, the limits of said liability for the state of Oklahoma Teaching Hospitals shall be . . .($200,000); or

3. . . .($1,000,000) for any number of claims arising out of a single occurrence or accident.


Section 154.F. of Oklahoma’s Act provides in pertinent part: “Nothing in this section shall be construed as increasing the liability limits imposed on the state or political subdivision under this act.” Id. § 154.F.

sion Tort Claims Act\textsuperscript{131} was constitutional, the Pennsylvania Supreme Court's decision in \textit{Smith} reflected an extremely deferential approach to legislative enactments.\textsuperscript{132} However, it is submitted that during the past fifteen years, Pennsylvania's high court has followed an historically and conceptually inconsistent approach in interpreting the constitutional provisions which were challenged in \textit{Smith}. First, the court has interpreted article I, section 11 to permit the judicial abrogation of the immunity doctrines\textsuperscript{133} and then to allow the legislative reinstatement of those very doctrines.\textsuperscript{134} Second, the court has interpreted article III, section 18 to permit the upholding of a $500,000 aggregate damage cap imposed by the Act.\textsuperscript{135} Moreover, the court has interpreted the equal protection clause of article III, section 32 to allow the classifications of

OREGON

Section 30.270(1) of Oregon's Act provides in pertinent part:

Liability of any public body or its officers, employees [sic] or agents acting within the scope of their employment or duties on claims within the scope of ORS 30.260 to 30.300 shall not exceed: (a) $50,000 to any claimant for any number of claims for damage to or destruction of property, including consequential damages, arising out of a single accident or occurrence. (b) $100,000 to any claimant for all other claims arising out of a single accident or occurrence. (c) $300,000 for any number of claims arising out of a single accident or occurrence.


135. \textit{See Smith}, \textit{512 Pa.} at 140, 516 A.2d at 312. For a discussion of the majority and dissenting opinions regarding the article III, § 18 challenge, see \textit{supra} notes 115-22 and accompanying text.
tort claimants created by the statute. While this is consistent with a deferential approach to legislative enactments, the court in so doing accepted as a justification for the classification the same policy reasons it had previously rejected in Mayle and Ayala.

A. Interpretation of Article I, Section 11 and Article III, Section 18

Prior to its decision in Mayle, the Pennsylvania Supreme Court had relied on article I, section 11 as constitutional justification for sovereign immunity. The Mayle court, however, rejected that view, stating that the courts' interpretation was simply a device to shore up "a crumbling legal concept." Rather than rejecting the constitutional theory outright, though, the Mayle court held that article I, section 11 was neutral with regard to the doctrine of sovereign immunity.

136. Smith, 512 Pa. at 140, 516 A.2d at 312. For a discussion of the majority and dissenting views in Smith of the equal protection challenge, see supra notes 125-128 and accompanying text.

137. For a discussion of the policy reasons rejected in Mayle and Ayala, see supra notes 30 & 41-42 and accompanying text.

138. For a discussion of Mayle, see supra notes 38-42 and accompanying text.

139. For a discussion of the view that article I, § 11 mandates sovereign immunity, see supra note 53 and accompanying text. For a discussion of the view that article I, § 11 is neutral with regard to sovereign immunity, see supra note 53 and infra notes 141-42 and accompanying text.

140. Mayle, 479 Pa. at 403, 388 A.2d at 718 (citing Kitto v. Minot Park Dist., 224 N.W.2d 795, 799 (N.D. 1974)).

141. Id. at 406, 388 A.2d at 719. The court concluded that "[t]here is no evidence that this sentence ['Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the legislature shall, by law direct.'] was added to make sovereign immunity the constitutional rule unless the Legislature decides otherwise." Id. at 402, 388 A.2d at 717-18. The first sentence of article I, § 11, which was quoted above, is the equivalent of the "certain remedy" clauses of other states, which were enacted to protect citizens' rights to legal redress. Each state interprets its provision a little differently, but despite the variations, no state reads the "certain remedy" clause as a constitutional guarantee of recovery for all alleged injuries.

For example, for a discussion of the Illinois Supreme Court's interpretation of its "certain remedy" clause, see Seifert v. Standard Paving Co., 64 Ill.2d 109, 120, 355 N.E.2d 537, 541 (1976) (when General Assembly provides both the right and the remedy, it may properly limit the amount of recoverable damages). There is no right to sue the state of Illinois for the negligent acts of its employees unless the General Assembly provides for it. Id. However, when the General Assembly enacted the Court of Claims Act, it created both the right and the remedy, and is, therefore, permitted to limit the allowable recovery. Id.; see also Wright v. Central DuPage Hosp. Ass'n, 63 Ill.2d 313, 329-30, 347 N.E.2d 736, 743 (1976) (provision limiting medical malpractice recoveries to $500,000 ruled unconstitutional as arbitrary and unreasonable); Hall v. Gillins, 15 Ill.2d 26, 147 N.E.2d 352 (1958). In Hall, the plaintiff challenged the validity of a $25,000 limitation on recovery provision in the Wrongful Death Act, alleging that it violated section 19 of Article II of the Illinois Constitution of 1870 (now section 12 of Article I of the Constitution of 1970). Id. at 28, 147 N.E.2d at 353. The Act provides in pertinent part: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or
By adopting this open-ended approach, the Mayle court was able to

reputation." Ill. Const. art. I, § 12. The Hall court held that there was no violation of the "certain remedy" clause. Hall, 13 Ill.2d at 29, 147 N.E.2d at 354; accord Cunningham v. Brown, 22 Ill.2d 23, 30, 174 N.E.2d 153, 157 (1961) (certain remedy clause does not require courts "to recognize a remedy when the legislature has already provided such remedy even though the statutory remedy be limited as to the recoverable damages").

For cases involving New Hampshire's "certain remedy" clause, see Estate of Cargill v. City of Rochester, 119 N.H. 661, 665, 406 A.2d 704, 706 (1979) ("We are not prepared to hold that all such limitations on the amount of recovery violate the constitutional rights of New Hampshire citizens."); appeal dismissed, 445 U.S. 921 (1980); Hackett v. Perron, 119 N.H. 419, 422, 402 A.2d 193, 195 (1979) (clause does not guarantee that all injured persons will receive full compensation for their injuries). Article 14, part I of the New Hampshire constitution provides:

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws.

N.H. Const. part I, art. 14; see also Sousa v. State, 115 N.H. 340, 345, 341 A.2d 282, 285-86 (1975). In Sousa, the Supreme Court of New Hampshire stated:

[State immunity for torts involves certain factors not present in the immunity of cities and towns. By its magnitude the striking of a balance between granting relief to injured claimants and protecting the solvency of the State is a more complex problem at that level than it is for most cities and towns. Extremely broad considerations of public policy and government administration are involved.

115 N.H. at 345, 341 A.2d at 285-86; see also Merrill v. City of Manchester, 144 N.H. 722, 730, 332 A.2d 378, 384 (1974) ("[T]he legislature has authority to specify the terms and conditions of suit against cities and towns, limit the amount of recovery, or take any other action which in its wisdom it may deem proper.").

For a case discussing Wisconsin's "certain remedy" clause, Wis. Const. art. I, § 9, see Stanhope v. Brown County, 90 Wis. 2d 823, 845, 280 N.W.2d 711, 720 (1979) ($25,000 limit on recovery from governmental tortfeasors upheld uncertain "certain remedy" clause). Article I, § 9 of the Wisconsin Constitution provides:

Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

Wis. Const. art. I, § 9; see also McCoy v. Kenosha County, 195 Wis. 273, 218 N.W. 348 (1928) (phrase "injuries and wrongs" in "certain remedy" clause permitted only to those for which there were remedies at common law when constitution was adopted in 1848; thus, victim of governmental tortfeasor could only recover damages up to $5,000 statutory limit); Fireman's Ins. Co. v. Washburn County, 2 Wis. 2d 214, 224-25, 85 N.W.2d 840, 846 (1957) (when right of action is given by statute, legislature has power to take it away by statute). Accord Daniels v. City of Racine, 98 Wis. 649, 652, 74 N.W. 553, 554 (1898); see also Schwenkoff v. Farmers Mutual Auto. Ins. Co., 11 Wis. 2d 97, 104, 104 N.W.2d 154, 158 (1960) (Currie, J., concurring) (Article I, Section 9, "must be construed in the light of the common law as it stood at the time of the adoption of the constitution in 1848.").

For a discussion of Pennsylvania decisions on this issue, see Singer v. Shepard, 464 Pa. 387, 346 A.2d 897 (1975) (statute which substituted mandatory
justify its abolition of the doctrine of sovereign immunity. However, the consequence of adopting this expansive interpretation was to invite the legislature’s contrary response: the legislature, in effect, overruled the judicial abrogation of the doctrines of sovereign and governmental immunity by enacting the Sovereign Immunity Act and the Political Subdivision Tort Claims Act. Consequently, despite the court’s earlier rejection of the policies underlying those two doctrines, its deferential approach to legislative enactments caused it to uphold the legislature’s reinstatement of sovereign and governmental

no-fault motor vehicle insurance for tort causes of action not violative of article I, § 11. The Singer court pointed out that no one “has a vested right in the continued existence of an immutable body of negligence law.” Id. at 399, 346 A.2d at 903; see also Jackman v. Rosenbaum Co., 263 Pa. 158, 175, 106 A. 238, 244 (1919), aff’d, 260 U.S. 22 (1922) (upholding authority of legislature and courts to modify remedies of land-owers in party-wall disputes). The Jackman court asserted:

[W]hat today is a trespass may, by development of law, not be so tomorrow. Therefore, it will not do to say . . . since, once upon a time, at common law, [an event] would have been a tort, giving rise to a claim for damages, that at the present day such an act has all the attributes of a common law trespass. Id.; see also Freezer Storage, Inc. v. Armstrong Cork Co., 476 Pa. 270, 382 A.2d 715 (1978). The Court in Freezer Storage stated that it has long been recognized that the law is required to respond to societal conditions, which may result in the denial of a cause of action. 476 Pa. at 281, 382 A.2d at 721.

142. Mayle, 479 Pa. at 406, 516 A.2d at 719. The Mayle court concluded that the purpose of the second sentence of article I, § 11 was “to preserve for the Legislature the opportunity . . . to make Pennsylvania immune in certain cases.” Id. at 402, 388 A.2d at 717. Immunity was not constitutionally mandated. Id. at 402, 388 A.2d at 717-18. But see Smith, 512 Pa. 129, 149, 516 A.2d 306, 316 (Papadakos, J., dissenting). Justice Papadakos rejected the neutrality theory and stated that “[i]f the power is not specifically delegated by the people, it is withheld and cannot be exercised by the government under the guise of ‘neutrality.’” Id. (Papadakos, J., dissenting). For a discussion of the neutrality theory, see supra note 53 and accompanying text.

143. Mayle, 479 Pa. at 406, 388 A.2d at 719. The court held that “article I, section 11 of the Pennsylvania Constitution does not preclude this Court from abrogating the doctrine of sovereign immunity.” Id. The court did not rule, however, that the constitution prohibited the legislature from enacting the sovereign immunity doctrine.

144. See id. at 406, 388 A.2d at 720 (judicial abrogation of sovereign immunity). For a discussion of the court’s holding in Mayle, see supra notes 41-42 & 43 and accompanying text. See also Ayala, 453 Pa. 584, 305 A.2d 877 (1973) (judicial abrogation of governmental immunity). For a discussion of the court’s holding in Ayala, see supra notes 30-31 and accompanying text.


147. See Mayle, 479 Pa. at 405, 388 A.2d at 719; Ayala, 453 Pa. at 592-97, 305 A.2d at 881-84. For a discussion of the Pennsylvania Supreme Court’s rejection of the policy reasons offered by governmental entities in favor of immunity, see supra notes 30 & 41-42 and accompanying text.
immunity.\textsuperscript{148}

It is submitted, however, that the court in \textit{Smith} erred by relying on the expansive interpretation of "Commonwealth" adopted in \textit{Carroll}; it failed to recognize the distinction between "Commonwealth" and political subdivisions as set forth in the plain language of article I, section 11.\textsuperscript{149} By simply equating political subdivisions with "Commonwealth," the court, as stated by Justice Larsen in \textit{Carroll}, employed a "legal slight-of-hand [sic]."\textsuperscript{150} As evidenced by the decisions in \textit{Ayala}\textsuperscript{151} and \textit{Brown},\textsuperscript{152} the court has treated governmental and sovereign immunity as two separate doctrines.\textsuperscript{153} Furthermore, five years after \textit{Ayala}, the \textit{Mayle} court specifically addressed the separate doctrine of sovereign immunity, distinguishing it from the judicially-abrogated doctrine of governmental immunity.\textsuperscript{154}

\begin{flushleft}

\textsuperscript{149} See \textit{Carroll}, 496 Pa. at 379, 437 A.2d at 402-03 (Larsen, J., dissenting). Justice Larsen stated that the "majority opinion gloss[ed] over the complex issues in this case by the simple expedient of equating 'political subdivisions' with 'the Commonwealth.'" \textit{Id.} at 379, 437 A.2d at 402 (Larsen, J., dissenting). Furthermore, he added that it was "on exceedingly meager authority," that the majority concluded that since the legislature has the authority to choose cases in which it will be immune, it may choose the cases in which political subdivisions will be immune. \textit{Id.} (Larson, J., dissenting) (emphasis in original).

\textsuperscript{150} \textit{Id.} (Larsen, J., dissenting). To support its conclusion, the \textit{Carroll} court stated that "'[m]unicipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed, and the extent of their powers determined by the Legislature and subject to change, repeal or total abolition at its will.'" \textit{Id.} at 367, 437 A.2d at 396 (quoting City of Pittsburgh v. Commonwealth, 468 Pa. 174, 179, 360 A.2d 607, 610 (1976) (quoting Commonwealth v. Moir, 199 Pa. 534, 541, 49 A. 351, 352 (1901))). It is submitted that this is not persuasive authority for the proposition that political subdivisions are to be equated with the Commonwealth.

\textsuperscript{151} For a discussion of \textit{Ayala}, see supra notes 28-32 and accompanying text.

\textsuperscript{152} For a discussion of \textit{Brown}, see supra note 34 and infra note 153 and accompanying text.

\textsuperscript{153} See \textit{Brown}, 453 Pa. at 572, 305 A.2d at 871. The court in \textit{Brown} held that "'Article I, Section 11 of our Constitution compels the conclusion, however, that this Commonwealth's immunity is constitutionally, not judicially mandated.'" \textit{Id.} at 571, 305 A.2d at 870 (emphasis added). Furthermore, the court noted that "'[w]hether the doctrine of sovereign immunity should be modified in this Commonwealth is a legislative question. We could not base a contrary holding upon our impatience with the Legislature's failure to act as speedily and comprehensively as we believe it should.'" \textit{Id.} at 572, 305 A.2d at 871.

\textsuperscript{154} \textit{Mayle}, 479 Pa. at 386-87, 388 A.2d at 710. The court concluded that there was no rational basis for status-based immunity and listed the types of immunity that had been judicially repudiated including local government immunity. \textit{Id.} at 387 n.3, 388 A.2d at 710 n.3. For a discussion of cases in which the
Additionally, it is submitted that the legislative enactment of two separate acts, the Sovereign Immunity Act\textsuperscript{155} and the Political Subdivision Tort Claims Act,\textsuperscript{156} reflects the legislature's recognition of the "Commonwealth" and political subdivisions as two different entities. The most noticeable distinction between the two acts is their different limitations on recoverable damages.\textsuperscript{157} Therefore, it is suggested that the Smith court unjustifiably equated political subdivisions with "Commonwealth" to square its earlier, result-oriented constitutional interpretation of article I, section 11 with the enactment of the Political Subdivision Tort Claims Act.\textsuperscript{158}

In upholding the constitutionality of the Act in Smith, the court addressed a different set of facts than those presented in Carroll. The factual scenario in Smith required the resolution of a claim under an additional constitutional provision, article III, section 18.\textsuperscript{159} The court addressed the article III, section 18 challenge by shifting the focus away from the plain language of the provision to a consideration of the framers' intent.\textsuperscript{160} Article III, section 18 expressly prohibits the legislature from limiting damages in all but workmen's compensation cases.\textsuperscript{161} Nevertheless, the Smith court avoided the proscription of article III, section 18 by concluding that since the provision had been drafted in response to previous legislation limiting recovery—enacted at the instance Pennsylvania Supreme Court has abrogated other judicially created status-based immunity doctrines, see supra note 46 and accompanying text.

\textsuperscript{155} 42 PA. CONS. STAT. ANN. §§ 8521-8528 (Purdon 1982 & Supp. 1987). For the text of the statute's pertinent provisions, see supra note 56.

\textsuperscript{156} 42 PA. CONS. STAT. ANN. §§ 8541-8564 (Purdon 1982 & Supp. 1987). For the text of the statute's pertinent provisions, see supra note 57.

\textsuperscript{157} For a comparison of the two immunity acts, see supra notes 56-57 and accompanying text. The Sovereign Immunity Act provides for $1,000,000 in aggregate recovery for injuries due to any one action or series of actions. 42 PA. CONS. STAT. ANN. § 8528(b) (Purdon 1982). The Political Subdivision Tort Claims Act, however, provides for a $500,000 limit. \textit{Id.} § 8553(b).

\textsuperscript{158} For a discussion of the majority's failure to justify why "Commonwealth" was extended to include political subdivisions, see supra notes 149-54 and accompanying text.

\textsuperscript{159} The challenge in Smith focused on the limitation on damages provision. Smith, 512 Pa. at 132, 516 A.2d at 308.

\textsuperscript{160} \textit{Id.} at 136, 516 A.2d at 309-10. The court concluded that because the intended scope of this section was to prevent private parties from securing an unfair limitation of liability through influence in the General Assembly, and because the Framers would have had no reason to concern themselves with governmental liability in tort, that Article III, section 18 does not operate to restrict the General Assembly from providing for less than full recovery for injuries to persons or property where the defendant is a governmental entity.

\textit{Id.} at 136, 516 A.2d at 309-10 (emphasis in original).

\textsuperscript{161} Pa. Const. art. III, § 18. For a discussion of the history of article III, § 18, see supra notes 121-22 and accompanying text. For the text of this provision, see supra note 93.
of powerful private interest groups—\(^{162}\) and because sovereign immunity had been in force at the time the framers drafted the provision, the framers could not have intended the limitation to apply to legislative enactments involving the Commonwealth.\(^{163}\)

It is submitted that an extension of the reasoning used in the Smith majority's framers' intent analysis reveals its internal inconsistency.\(^{164}\) The first prong of the majority's rationale suggests that the framers' intent in drafting the provision was to preclude the legislature from enacting laws which would protect private entities, specifically railroads, from tort claims.\(^{165}\) In the second prong of the analysis, the majority stated that because suits against the sovereign had not been contemplated at the time of the framing of article III, section 18, the clause could not have been intended to affect the sovereign's immunity.\(^{166}\) However, it is suggested that if the framers' intent was to preclude the legislature from awarding private tortfeasors a limitation on the tort damages recoverable against them, then the logical extension of the second prong of the majority's analysis would defeat that purpose.\(^{167}\)

Under the second prong of the majority's rationale, the court is not to apply the damage limitation proscription of article III, section 18 to a

\(^{162}\) Smith, 512 Pa. at 135, 516 A.2d at 309.

\(^{163}\) For a more detailed discussion of the Smith majority's framers' intent argument, see supra notes 119 & 121-22 and infra notes 165-66 & 174 and accompanying text.

\(^{164}\) For a discussion of the dissenting view of this rationale, see Smith, 512 Pa. at 150-53, 516 A.2d at 317-18 (Papadakos, J., dissenting). Justice Papadakos concluded: (1) the constitution should be construed on the basis of its plain language, which requires that there be no limitation of recovery except for workmen's compensation cases; (2) despite the majority's position that the Commonwealth was immune from suit in 1874, there was legislation at that time "permitting suits against the Commonwealth and its subdivisions in eminent domain cases, for contract breaches, escheat matters, and other matters where the attorney general was authorized to represent the Commonwealth, without limitation on the damages recoverable" and (3) the majority's interpretation of article III, § 18 "could easily be read to protect only those actions which the Legislature of Constitutional Drafters were aware of in 1874," which "would permit the Legislature to limit damages in all public and private actions recognizable after 1874." Id. at 151-53, 516 A.2d at 318 (Papadakos, J., dissenting).

\(^{165}\) Id. at 135, 516 A.2d at 309. The majority stated that in article III, § 18 the framers were responding "to the fact that certain powerful private interests had been able to influence legislation which limited recovery in negligence cases filed against them." Id. Furthermore, the majority concluded that "the Framers were addressing themselves to private, not governmental" tortfeasors. Id.

\(^{166}\) Id. at 136, 516 A.2d at 309. In concluding that the provision was only intended to apply to private tortfeasors, the majority based its view on the statement that "the Framers would have had no occasion to apply the prohibition against limiting damages to government, for government, at that time, was immune from suit." Id. According to Justice Papadakos, this premise was a misstatement of history. Id. at 151-53, 516 A.2d at 317-18 (Papadakos, J., dissenting).

\(^{167}\) For a discussion of the framers' intent with regard to the framing of article III, § 18, see supra notes 119, 121-22 & 165-66 and accompanying text.
cause of action which was not in existence at the time of the framing of that provision. It is submitted that this rationale, as noted by Justice Papadakos in his dissent, would permit legislation limiting recoverable damages for any cause of action unknown to the framers of article III, section 18. Suppose, for example, that a general tort recovery limitation was enacted in response to a recently developed cause of action, such as the strict liability approach adopted by Restatement (Second) of Torts § 402A regarding defective products. Taking the second prong of the Smith court’s two-pronged rationale to its logical extreme, the limitation on tort recovery would be constitutional: the framers could not have intended to preclude the limitation of recovery in strict liability claims against the manufacturers of unreasonably dangerous and defective products, since such suits did not exist in 1868. It is suggested that this would not be the result intended by the framers of article III, section 18.

However, under the Smith majority’s rationale for upholding the limitation on recovery of damages at issue in this case, article III, section 18 was interpreted in light of the framers’ intent to preclude any limitation on damage recovery against private tortfeasors. The Smith court’s interpretation of article III, section 18 emphasized that only limitations on damage recovery against governmental tortfeasors would be permissible under that constitutional provision. Thus, any limitation enacted as part of a general tort reform law, such as a damage cap on recovery for medical malpractice claims or product liability claims against private tortfeasors, would be a violation of article III, section 18. Although this result appears to follow necessarily from the Smith

168. See Smith, 512 Pa. at 153, 516 A.2d at 318 (Papadakos, J., dissenting).
169. Id. (Papadakos, J., dissenting). Justice Papadakos stated that by applying the majority’s interpretation, the legislature would be able to “limit damages in all public and private actions recognizable after 1874.” Id. (Papadakos, J., dissenting).
170. Restatement (Second) of Torts § 402A (1965).
171. Smith, 512 Pa. at 153, 516 A.2d at 318 (Papadakos, J., dissenting). “Actions by or against women, product liability claims, malpractice cases, automobile accidents, nuclear power, gas, and electricity accidents, all unknown to the law in 1874, could be limited by such an interpretation.” Id. (Papadakos, J., dissenting).
172. Id. (Papadakos, J., dissenting). According to Justice Papadakos, the purpose of article III, § 18 was to prevent “present and future attempts by the Legislature to fritter away the rights of the people.” Id. (Papadakos, J., dissenting).
173. Id. at 135, 516 A.2d at 309.
174. Id. The majority stated that “[c]onsideration of the full scope and meaning of Section 18, therefore, reveals that the Framers were addressing themselves to private, not governmental defendants.” Id.
175. Id. The majority concluded that “the intended scope of this section was to prevent private parties from securing an unfair limitation of liability through influence in the General Assembly.” Id. at 136, 516 A.2d at 309-10 (emphasis in original).
majority's holding, it is in direct conflict with the outcome under a logical extension of the second prong of the majority's rationale, which would permit limitations on recently developed causes of action, such as automobile accident claims, regardless of the status of the tortfeasor. 176 Therefore, the two-pronged rationale which the majority used to support its resolution of the article III, section 18 challenge can be viewed as internally inconsistent and self-contradictory.

B. Interpretation of the Equal Protection Clause

In Smith, the court considered a challenge under the broad contours of the equal protection clause of both the Pennsylvania and the United States Constitutions. It held that the guarantee of equal protection had not been violated by the legislature's imposition of a $500,000 limit on aggregate recovery in tort claims filed against a political subdivision for damages due to one act or a series of acts under the Political Subdivision Tort Claims Act. 177 The Act distinguishes plaintiffs injured by government entities from plaintiffs injured by private parties. 178 Furthermore, as a result of the damage cap, the Act treats plaintiffs who are severely injured and/or in a large group differently from those who are not: 179 the former suffer reduced recoveries, while the latter may recover full compensation for their injuries. 180 In upholding the constitutionality of the classification, the Smith court determined that preserving the public treasury was "self-evidently, an important governmental interest" which was closely related to the interest furthereed by the classification. 181

After noting the similarity between the state and federal constitutional equal protection guarantees, the court addressed the issue of which level of scrutiny should be applied. 182 Preliminarily, the court

176. For a discussion of the logical extension analysis of article III, § 18, see supra notes 164-72 and accompanying text.
177. Smith, 512 Pa. at 140, 516 A.2d at 312.
179. 42 Pa. CONS. STAT. ANN. § 8553(b) (1982).
180. See id.
181. Smith, 512 Pa. at 139, 516 A.2d at 311. In his dissenting opinion, however, Justice Papadakos rejected the majority's finding of an important governmental interest reasonably related to the governmental classification. Id. at 153-54, 516 A.2d at 318-19 (Papadakos, J., dissenting). Justice Papadakos concluded that the court let stand, "upon no rational basis, a damage limitation which creates a different measure of damages recoverable depending upon whether the tortfeasor is a private individual, a political subdivision or the Commonwealth." Id. at 153, 516 A.2d at 318. Furthermore, he stated that the majority view "ignore[d] the reality that these undercompensated victims of catastrophic proportions will quickly exhaust their meager recovery and become charges upon the very Commonwealth that should have adequately compensated them in the first place. It is thus illusory to boast that a limitation of damages protects the public treasury." Id. at 154, 516 A.2d at 319 (Papadakos, J., dissenting).
182. Id. at 137-38, 516 A.2d at 310-11. Pennsylvania courts have purported to treat the two equal protection clauses as the equivalent of one another. See
concluded that the “right to recovery” was not “fundamental” because the right of access to the courts is limited by article I, section 11 of the Pennsylvania Constitution. Next, three members of the court concluded, on the basis of James v. Southeastern Pennsylvania Transportation Authority, that a heightened level of scrutiny must be applied to legislation which infringes on the right to full recovery, because it is an important right. Two members of the court concurred in the result, but stated that the rational basis test should have been applied. It is suggested that the application of an intermediate level of scrutiny in Smith was inconsistent with the United States Supreme Court’s recent


To see the similarities in application accorded the two, compare Milk Control Comm’n v. Battista, 413 Pa. 652, 198 A.2d 840 (classification is not “patently arbitrary” or “utterly lacking” in rational basis, and bears reasonable relation to price structure lawfully fixed by Milk Control Commission), appeal dismissed, 379 U.S. 3 (1964) with Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955) (law does not need to be “logically consistent” with its goals in all respects to be constitutional; “it is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it”). See also Tosto v. Nursing Home Loan Agency, 460 Pa. 1, 14, 331 A.2d 198, 204 (1975) (legislature may create statutory classifications bearing rational relationship to legitimate state purpose).

183. Smith, 512 Pa. at 139, 516 A.2d at 311. This characterization is arguably based on somewhat circular reasoning. The article I, § 11 limitation on access to the courts when the government is the tortfeasor was itself under challenge by the plaintiffs. Thus, the majority arguably used one challenged provision as a basis for upholding another challenged provision.


185. Smith, 512 Pa. at 139, 516 A.2d at 311. “Again, as in James, although the right to a full recovery in cases brought against the Commonwealth has been constitutionally limited, that right is, nevertheless, generally an important right and its limitation by way of governmental classification requires a heightened scrutiny of the validity of the classifying statute.” Id. (citing James v. Southeastern Pa. Transp. Auth., 505 Pa. 137, 477 A.2d 1302 (1984)).

rulings on fourteenth amendment equal protection challenges: the rational basis test should have been applied in a case involving an "access to the court" issue.187 In any event, the court applied intermediate scrutiny and, as mentioned above, concluded that the classification was constitutional.188

It is submitted that the Pennsylvania Supreme Court has been inconsistent in its view of the governmental interest in preserving the public treasury.189 In both Ayala and Mayle, the court determined that there

187. A number of Supreme Court cases have held that a denial of free access to the courts may require the application of a heightened level of scrutiny when that denial is accompanied by some other type of discriminatory action. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (mental retardation is not quasi-suspect class requiring heightened standard of scrutiny); Boddie v. Connecticut, 401 U.S. 371 (1971) (although indigents are not suspect class, due process prohibits state from denying indigents access to its courts solely because of inability to pay); Griffin v. Illinois, 351 U.S. 12 (1956) (state must provide trial transcript to indigent criminal defendants appealing conviction on non-federal grounds, but they are not classified as suspect class). Thus, in its attempt to apply a federal standard of review of the equal protection challenge, the Pennsylvania Supreme Court inappropriately applied heightened scrutiny in Smith: there were no factors warranting such treatment. It is submitted that the rational basis analysis should have been applied, as suggested by Justices Zappala and Hutchinson. Smith, 512 Pa. at 141, 516 A.2d at 312 (Zappala, & Hutchinson, J., concurring).

Cf. Pfost v. State, 713 P.2d 495 (Mont. 1985). The Supreme Court of Montana held in Pfost that the statute limiting tort liability of that state and its political subdivisions violated the state's equal protection guarantees. Id. at 505-06. The court determined that the statute—providing that persons with tort damages valued at less than $300,000 would have full redress for their injuries if the tortfeasor was the state, but persons with catastrophic damages exceeding $300,000 would not—was discriminatory on its face, thereby triggering an equal protection inquiry. Id. at 500. The court began by concluding that the states may interpret their equal protection clauses as affording greater protection to their citizens than that afforded by the fourteenth amendment. Id. Consequently, the court characterized "full legal redress for injury to person, property or character" as a fundamental right and, therefore, required the state to show a compelling state interest to sustain the statute's constitutionality. Id. at 503. Because the state was unable to sustain its burden, the court held that the statute was unconstitutional. Id. at 505-06.

188. Smith, 512 Pa. at 139-40, 516 A.2d at 311-12. But see id. at 144, 516 A.2d at 314 (Larsen, J., dissenting). Justice Larsen stated that in his view, regardless of whether we employ a 'strict scrutiny,' 'heightened scrutiny,' or 'rational basis' standard of review, the classifications created by the Act based solely on the identity and status of the tortfeasor are arbitrary, do not bear a fair and substantial relation to any legitimate state purpose, and deny to the claimants the enjoyment of their civil rights and equal protection of the laws under the state and federal constitutions.

Id. (Larsen, J., dissenting) (emphasis in original); see also Martin v. Unemployment Compensation Bd. of Review, 502 Pa. 282, 308, 466 A.2d 107, 121 (1983) (Larsen, J., dissenting) (role of judiciary is to "scrutinize legislative enactments for classifications which have no rational basis or bear no reasonable relation to legitimate legislative goals"), cert. denied, 466 U.S. 952 (1984).

189. Smith, 512 Pa. at 153, 516 A.2d at 319 (Papadakos, J., dissenting). Justice Papadakos criticized the majority's argument that "such a limit on damages
was no rational basis for upholding the immunity doctrines.\(^{190}\) Specifically, the *Mayle* court rejected all of the policy arguments advanced including the preservation of the treasury argument, and concluded that "[o]nce the 'errors of history, logic and policy' which underly both sovereign immunity and the Commonwealth's constitutional interpretation have been laid bare, we see no reason to perpetuate them."\(^{191}\)

It is suggested that the court's "inconsistency" is a result of its extremely deferential approach to reviewing legislative acts\(^{192}\) as opposed to a close examination of the policy reasons underlying judicially-created doctrines such as governmental and sovereign immunity.\(^{193}\) In *Carroll* and *Smith*, the court did not re-examine the reasons for the legislation; rather, the court simply accepted as important the very same policy reasons that it had previously rejected in *Ayala*\(^{194}\) and in *Mayle*.\(^{195}\)

**IV. Conclusion**

It is submitted that the deferential approach taken by the court to the legislature's policy formulation is appropriate provided that the enactment is constitutional on its face. Indeed, it is not the court's role to act as a super-legislature.\(^{196}\) However, it is suggested that the court may have disregarded the mandates of the Pennsylvania Constitution, with regard to article I, section 11, article III, section 18 and article III, section 11, article 11, id. (Papadakos, J., dissenting), while ignoring the fact that the court had rejected the same argument earlier in *Ayala* and in *Mayle*. *Smith*, 512 Pa. at 153, 516 A.2d at 319 (Papadakos, J., dissenting).

190. See *Mayle*, 479 Pa. at 399, 388 A.2d at 716 ("Thus, all the historic arguments made for sovereign immunity either have never been accepted in Pennsylvania or reflect obsolete legal thinking. None has continuing vitality."); *Ayala*, 453 Pa. at 597, 305 A.2d at 883. In *Ayala*, the court quoted California Supreme Court Justice Traynor's statement that "the rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia." *Id.* (citing *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961)). For a discussion of the Pennsylvania Supreme Court's rejection of the underlying policy reasons for governmental and sovereign immunity, see supra notes 30 & 41-42 and accompanying text.


192. See *Carroll*, 496 Pa. 363, 437 A.2d 394 (1981). In *Carroll*, the majority concluded that "[i]t is not our function to displace a rationally based legislative judgment" and that "it is within the province of the Legislature to determine that certain bars to suit are, in its judgment, needed for the operation of local government." *Id.* at 369-70, 437 A.2d at 397.

193. For a discussion of the court's close examination of the policy reasons purportedly underlying the judicially-created immunity doctrines, see supra notes 30 & 41-42 and accompanying text.


195. *Mayle*, 479 Pa. at 394-406, 388 A.2d at 713-19. For a discussion of the court's deferential approach in *Carroll* and *Smith* to the legislative enactment of governmental immunity, see supra notes 132, 148 & 192 and accompanying text.

196. For a discussion of the court's refusal to act as such a legislative body, see supra notes 132, 148 & 192 and accompanying text.
tion 32, in an effort to uphold the constitutionality of the Political Subdivision Tort Claims Act.\textsuperscript{197}

Throughout its history, the Pennsylvania Supreme Court has employed a result-oriented approach in interpreting article I, section 11. First, because the court favored the doctrine of sovereign immunity, the court interpreted article I, section 11 to mandate it. Then, in a decision in which the court abrogated the doctrine, the court held that article I, section 11 was neutral with regard to the immunity doctrine. It is suggested that once the court adopted the neutrality theory, which arguably was used to abolish the outmoded common-law doctrine of sovereign immunity, that very interpretation opened the door for the legislature to enact the doctrine of sovereign immunity into law.\textsuperscript{198}

In summary, the Pennsylvania Supreme Court has interpreted the constitution, regarding the permissible exercise of governmental power, in an expansive way, allowing the legislature to immunize governmental tortfeasors on both state and municipal levels. On the other hand, the court has interpreted the constitutional protection of individual rights in a narrow way. The court, in both \textit{Smith} and \textit{Carroll}, has interpreted article I, section 11 to allow the legislature to create immunity and to limit tort claimants' recovery, and thereby, to take away the public's rights to certain remedies under article I, section 11.\textsuperscript{199} Additionally, the \textit{Smith} court employed a novel interpretation of article III, section 18 to permit a legislatively imposed limit on an individual tort claimant's recovery against governmental entities.\textsuperscript{200}

Furthermore, the court displayed complete deference to the legislature regarding the equal protection challenge to the damage limitation provision of the Political Subdivision Tort Claims Act. While such deference is traditionally accorded economic legislation under equal protection review, its impact on injured tort claimants is heavy. Moreover, the result of the court's holding in \textit{Smith} is that only governmental tortfeasors are shielded by the cloak of immunity. The court's judicial deference allows the state legislature to protect its self-interest at the expense of injured plaintiffs, some of whom are catastrophically injured, while others are simply part of a large claimant group. Consequently, the burden is placed on the plaintiffs, rather than spread out over the entire citizenry. It is submitted that the court properly recognized that this is a policy decision for the legislature to make. Given the court's

\textsuperscript{197} See \textit{Smith}, 512 Pa. at 141, 516 A.2d at 312 (Larsen, J., dissenting). "I believe the Act clearly and palpably violates Article I, Section 11 and Article III, Section 18 of the Pennsylvania Constitution." \textit{Id.} (Larsen, J., dissenting).

\textsuperscript{198} For a discussion of the neutrality theory, see supra notes 43, 53, 141 and accompanying text.

\textsuperscript{199} For a discussion of the court's interpretation of article I, § 11 in \textit{Carroll} and \textit{Smith}, see supra notes 68-79 and accompanying text.

\textsuperscript{200} For a discussion of the \textit{Smith} court's interpretation of article III, § 18, see supra notes 165-66 & 174-75 and accompanying text.
earlier decisions to abolish governmental and sovereign immunity,201 however, the fact that the court found an important state interest in preserving the public treasury after rejecting that very policy in its prior cases shows the radical difference between the examination of policy justifications for judicial doctrines as opposed to legislative enactments.

Additionally, it is suggested that the court in Smith may not have fully addressed the issues involved in interpreting article I, section 11 and article III, section 18. More specifically, it is submitted that the court has read out of article I, section 11 the clear distinction between “Commonwealth” and political subdivisions, and disregarded the plain language of article III, section 18 which states that the legislature will not limit damages except in workmen’s compensation cases.202

It is submitted that the effect of the Pennsylvania Supreme Court’s decision in Smith is to offer a degree of protection to governmental entities against tort claims, while revealing the constitutional barriers which it has inadvertently created with regard to general tort reform.203

Jan Denise Loughran

201. For a discussion of the Pennsylvania Supreme Court’s abrogation of judicially-created governmental and sovereign immunities, see supra notes 29-31 & 38-41 and accompanying text.

202. For a discussion of the interpretation of article III, § 18, see supra notes 118-22, 164-65, 169, 171-72, 174-75 and accompanying text.

203. For a discussion of the recommendations made by the American Bar Association Action Commission regarding the improvement of the tort liability system, see McKay, Rethinking the Tort Liability System: A Report from the ABA Action Commission, 32 Vill. L. Rev. 1219 (1987).