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Administrative Law Progress in 1995: Important Pennsylvania Supreme Court Decisions

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I. INTRODUCTION

This article examines several selected administrative law cases that the Supreme Court of Pennsylvania decided in 1995. In so doing, it differs from other writings which describe important cases for the legal profession during a given period of time. The focus here is selective, and there is no attempt or intent to list comprehensively all Pennsylvania Supreme Court cases which deal with administrative law issues.

This review diverges from traditional descriptive reviews of legal developments in two other significant respects. First, the author is attempting to write about only the most significant cases. Thus there has been no attempt to include all administrative law cases or to include cases representing activity in particular areas or affecting particular agencies. Second, every attempt has been made to evaluate and analyze the opinions at some length rather than merely to describe them. The objective of the author is not only to deal with the major issues posed by the cases in terms of the area of law or particular subject—for example, labor law or sovereign immunity—but also to deal with the broader, more fundamental issues of constitutional and

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1 Opinions of other administrative lawyers may well differ with regard to which administrative law cases decided in 1995 are the most important. The cases described in this Article are those that I believe are the most important decided in 1995. The reasons for their selection are indicated in the text.
administrative law which the opinions pose. There has not been very much analysis of this type in regard to Pennsylvania administrative and constitutional decisions in the recent past. There is a growing interest in, and emphasis on, state constitutional law, and state courts—including Pennsylvania's—are deciding more cases in this area. Administrative law is a branch of constitutional law; therefore, cases in this area merit critical scholarly examination and discussion. The author is hopeful that this style of analysis will lead to critical examinations of the state of administrative law in Pennsylvania and, perhaps, lead to a dialogue that will help in continuing the development of this area of law. In any event, whether a dialogue develops or not, the author plans to write this review of important administrative decisions each year.

II. SCOPE OF REVIEW-STANDARD OF REVIEW: PENNSYLVANIA STATE POLICE v. PENNSYLVANIA STATE TROOPERS' ASS'N

In an important case, Pennsylvania State Police v. Pennsylvania State Troopers' Ass'n, the Pennsylvania Supreme Court construed Act 111 to identify the nature of review of grievance arbitration in collective bargaining cases involving public safety employees. In doing so, the court clarified the meaning of the terms "scope of review" and "standard of review," thereby contributing to a growing line of cases on the subject. This case is important because of its guidance in the public employee labor area and because of its clarification of the evolving area of law pertaining to scope of review or standard of review, an area that has been the subject of several recent, and sometimes confusing, opinions.

In one of the cases, a state trooper was disciplined for conduct unbecoming to an officer. After punishment was imposed, the trooper sought arbitration under contract grievance procedures available pursuant to Act 111, the statute governing collective

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2 656 A.2d 83 (Pa. 1995). Unless otherwise noted, the following facts are taken from Pennsylvania State Police, 656 A.2d at 85-86.
4 Pennsylvania State Police, 656 A.2d at 88.
bargaining for policemen and firemen. The arbitrator reduced the penalty imposed, and the state police appealed the arbitrator's decision to the commonwealth court.\(^5\)

The commonwealth court reversed the arbitrator's award, which had reversed the decision of the State Police Court-Martial Board.\(^6\) Distinguishing earlier Pennsylvania Supreme Court precedents that had employed a "narrow certiorari" scope of review in similar types of arbitration, the commonwealth court applied a scope of review known as the "essence test," which was taken from the recently enacted Uniform Arbitration Act.\(^8\) This essence scope of review has been regularly used in "both the public and private sectors to review arbitration awards in grievance proceedings," as well as in the federal court system.\(^9\)

The "essence test" permits a reviewing court to reverse an arbitrator's decision in grievance arbitration if the court concludes that the award did not draw its "essence" from the collective bargaining agreement.\(^10\) Essence analysis requires the court to decide whether the collective bargaining agreement covers, touches upon, or relates to the subject matter of the dispute.\(^11\) If it does, then the arbitrator's decision must be in accord with the

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\(^6\) Pennsylvania State Police (Betancourt), 633 A.2d at 1288.

\(^7\) Under the "narrow certiorari" scope of review, the court is limited to the following questions: (a) jurisdiction of arbitrators; (b) regularity of arbitration proceedings; (c) excessive exercise of the arbitrator's powers; and (d) constitutional questions. Id. at 1281.

\(^8\) Id. at 1280-81 (citing 42 PA. CONS. STAT. §§ 7301-7320 (1990)).

\(^9\) Id. at 1280.

\(^10\) Id.

\(^11\) Id. at 1280-81.
agreement.

The commonwealth court observed that in "just cause for dismissal" cases, the outcome often differed depending on the standard utilized. The court stated that this difference was most apparent in "just cause for dismissal" cases where the arbitrator found that the acts alleged by the employer had in fact occurred, but that the acts did not constitute just cause for the particular discipline imposed because it was deemed too severe; thus, under these circumstances, the arbitrator typically imposes a lesser punishment. In the experience of the commonwealth court, application of the "essence test" by a court on appeal frequently leads to a reversal of the arbitrator's decision. However, the commonwealth court recognized that the narrow certiorari test usually results in the arbitrator's award being upheld because that standard is considerably more deferential to the award from which an appeal is taken. The essence test is much broader and less deferential than the narrow certiorari test and, by applying it, the appellate court will be inclined to reverse the arbitrator's decision in many more situations.

After this introduction, the commonwealth court applied the

\[\text{id. at 1281.}\]

\[\text{id. at 1281-82. This was the case in the three arbitration decisions that were later consolidated for review by the Pennsylvania Supreme Court in Pennsylvania State Police v. Pennsylvania State Troopers' Ass'n, 656 A.2d 83, (Pa. 1995). \text{id. at 85-86.}\]

\[\text{Pennsylvania State Police (Betancourt), 633 A.2d at 1282.}\]

\[\text{id. at 1282.}\]

\[\text{Id. at 1282.}\]


Narrow certiorari is a very narrow scope of review. We are limited to consider questions regarding: (1) the jurisdiction of the arbitrators; (2) the regularity of the proceedings; (3) an excess of the arbitrator's powers; or (4) the deprivation of constitutional rights. Under the narrow certiorari scope of review, an error of law alone will not warrant the reversal of an arbitration award under Act 111. \text{id. at 41 (emphasis added) (citations omitted) (citing Pennsylvania State Police, 656 A.2d at 85; City of Washington v. Police Dep't, 259 A.2d 437, 441 (Pa. 1969)).}
essence test to the facts before it because it determined that "the [Uniform Arbitration Act (UAA)] is the source of the authorization for the inclusion of grievance arbitration in police and fire collective bargaining agreements" and the UAA specifically provides for the utilization of the essence test.\(^{17}\) The court observed that the regulations of the State Police clearly define conduct unbecoming to an officer and that numerous other Pennsylvania cases had similarly defined the nature of the acts constituting unbecoming conduct.\(^{18}\) Because the arbitrator found that the alleged conduct occurred but, nonetheless, did not constitute unbecoming conduct, the court held that the arbitrator’s award did not draw its essence from the collective bargaining agreement.\(^{19}\) The court reversed the arbitrator and reinstated the penalty imposed by the Court-Martial Board. The action of the commonwealth court thus fulfilled its own prediction that the use of the essence test will frequently result in reversing the arbitrator’s decision.\(^{20}\)

The Pennsylvania Supreme Court reversed this holding on the basis that the commonwealth court employed the wrong scope of review.\(^{21}\) While doing so, the supreme court clarified the meaning of the terms "scope of review" and "standard of review."

In order to understand the significance of the supreme court’s decision, it is necessary to review briefly the case of *Morrison v. Department of Public Welfare.*\(^{22}\) In that 1994 case, the supreme court relied on its decision in *Pennsylvania State Police (Betancourt)* to apply the essence test in the appeal of two other decisions in which arbitrators reduced the penalty imposed on the state police officer in question: Pennsylvania State Police v. Pennsylvania State Troopers’ Ass’n (Gibson), 633 A.2d 1330 (Pa. Commw. Ct. 1993), *aff’d,* 656 A.2d 83 (Pa. 1995); and Pennsylvania State Police v. Fraternal Order of Police (DiRaimo), 634 A.2d 270 (Pa. Commw. Ct. 1993), *rev’d,* 656 A.2d 83 (Pa. 1995).

\(^{21}\) Three appeals were consolidated for review by the Pennsylvania Supreme Court: *Pennsylvania State Police (Betancourt)*, 633 A.2d 1278; *Pennsylvania State Police (Gibson)*, 633 A.2d 1330; and *Pennsylvania State Police (DiRaimo)*, 634 A.2d 270.

\(^{22}\) 646 A.2d 565 (Pa. 1994).
court explained as part of its holding the difference between the terms "scope of review" and "standard of review." In *Morrison*, the court was faced with the question of the proper appellate criterion to apply with respect to an appeal from a trial court’s denial of a motion for a new trial. In reviewing a trial court’s exercise of discretion in granting or withholding a new trial, an appellate court must determine whether the trial court abused its discretion; the manner in which this review is conducted is denominated as the applicable "standard of review."23 The term "scope of review" refers to what an appellate court is permitted to examine under that particular standard of review and will vary from case to case.24 That is, if the trial court gives a particular set of reasons for its decision, the reviewing court can examine only those specific reasons.25 However, if the trial court leaves open the possibility that additional reasons may have caused its decision, the reviewing court may apply a much more extensive scope of review, which may include examination of the entire record.26

Drawing upon the reasoning of the *Morrison* decision, the supreme court in *Pennsylvania State Police* reasoned that a clarification was necessary not only because the intermediate appellate courts had incorrectly applied one of those terms—scope of review—but also because the supreme court itself had done so in some cases.27 This decision is important because the Pennsylvania Supreme Court further developed its analysis in this

23 *Id.* at 570 (citing *Coker v. S.M. Flickinger Co.*, 625 A.2d 1181, 1184 (Pa. 1993)). In *Coker v. S. M. Flickinger Co.*, the supreme court reaffirmed the "fundamental and longstanding precept that the decision to order a new trial is one that lies within the discretion of the trial court." *Coker*, 625 A.2d at 1184. Thus, the standard for appellate review of such a decision is always an abuse of discretion standard. *Morrison*, 646 A.2d at 570.

24 *Morrison*, 646 A.2d at 570.

25 *Id.* (citing *Coker*, 625 A.2d at 1185).

26 *Id.* (citing *Coker*, 625 A.2d at 1185).

27 *Pennsylvania State Police v. Pennsylvania State Troopers’ Ass’n*, 656 A.2d at 85 n.4 (Pa. 1995) (citing *Morrison*, 646 A.2d at 570). The court specifically stated that "[t]he narrow certiorari test has sometimes been referred to as a 'standard of review' by this Court and lower courts; this is incorrect." *Id.*
evolving area by demonstrating how those definitions specifically apply with respect to appeals involving Act 111.

Writing for the majority, Justice Cappy explained that the term "scope of review" refers to the "confines" within which the appellate court must conduct its review, or what the court may consider. The term "standard of review" refers to the manner in which the appellate court conducts its review. Narrow certiorari, the test that had been previously employed in grievance arbitration cases, describes the matters that an appellate court is permitted to review. Therefore, it is a matter that falls within the definition of scope of review. Because it is a matter regarding scope of review, it follows that the application of narrow certiorari may "confine" or limit the matters that the appellate courts may consider on appeals from grievance arbitration. In the present case, the supreme court stated that, although the commonwealth court correctly recognized that the issue before it involved scope of review, its conclusions about what the appellate court was permitted to consider under Act 111 were incorrect. The term "scope of review" operated in this area to narrow or limit the subjects that could be reviewed by the appellate courts.

The supreme court continued by examining the specific reasoning that the commonwealth court employed in determining that the applicable scope of review should be the broad "essence test" under Act 111 grievance arbitration. The principal difference between the two courts stemmed from their contrary conclusions on the issue of whether Act 111 authorized grievance arbitration. Under this line of analysis, if the source of authority for grievance arbitration is Act 111, precedent requires that the "narrow certiorari" scope of review be employed. However, if the source of authority for grievance arbitration is not in Act 111, but is instead the Uniform Arbitration Act, then the scope of review contained within that statute, the "essence test," applies. In its analysis of this issue, the supreme court flatly disagreed with the commonwealth court's conclusion that Act 111 does not authorize

28 Id.
29 Id. (citing Morrison, 646 A.2d at 570).
30 For a description of the narrow certiorari test, see supra notes 7, 16.
31 Pennsylvania State Police, 656 A.2d at 85 n.4.
grievance arbitration and that the authority for grievance arbitration—and hence the applicable scope of review—is thus found in the Uniform Arbitration Act. The supreme court stated that, although several more recent precedents had created some confusion, an earlier case, *Chirico v. Board of Supervisors*, clearly stated that Act 111 applied to grievance arbitration. The *Chirico* opinion unambiguously held that Act 111 authorized grievance arbitration, but the opinion did not mention the Uniform

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32 *Id.* at 87.
34 *Id.* at 474. In *Chirico* the supreme court stated:

> A dispute over the interpretation of a provision in an existing award falls within the ambit of grievance arbitration. "Grievance disputes are properly handled within the framework of section 1 of Act 111, which provides that "[Employees] shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act." Act 111 does not set forth the specific mechanism by which grievance, as compared with interest, disputes are to be arbitrated. We acknowledge it is clearly inadequate to recognize a right "to a settlement of grievances or disputes," while failing to provide any method for the implementation of those rights. This obvious vacuum must not be countenanced. Yet resort to the courts to meet this need would contravene the strong affirmance of the use of non-adversarial methods for the resolution of disputes between governmental employers and police and firemen embodied in section two of the Act.

*Id.* at 474-75 (alteration in original) (citations omitted). The court continued by providing a rationale for the conclusion that grievance arbitration is clearly called for under Act 111:

> First, Act 111 specifically avoids the use of the courts for dispute resolution. This policy is so strong that section seven of the Act, 43 P.S. 217.7, provides for binding arbitration and contains the unique provision that "[n]o appeal therefrom shall be allowed to any court." Thus the only method for settling grievance disputes allowable within the framework of Act 111 is arbitration.

> Second, resort to arbitration is well supported by the surrounding circumstances of a grievance dispute.

> Finally, we are convinced that arbitration is the proper forum for resolution of grievance disputes involving the interpretation of a provision of an award because the right sought to be enforced is not clear where there is an ambiguity.

*Id.* at 475 (citations omitted).
Arbitration Act in reaching that conclusion. Other cases that were decided after Chirico did not change its holding that grievance arbitration is authorized by Act 111.

The supreme court then turned to a different argument that the appellants asserted but was not addressed by the commonwealth court. The State Police argued that Act 111 was ambiguous or completely silent on the question of grievance arbitration. The State Police argued that because the Uniform Arbitration Act and its essence test are applicable by their express terms to any labor statute with which they are not inconsistent, it therefore followed that the Uniform Arbitration Act scope of review is applicable to grievance arbitration. The supreme court rejected this argument.

The supreme court turned to the legislative intent expressed in Act 111 and found a statement indicating that policemen and firemen are entitled to a remedy for grievances. However, the court reasoned that the failure of the legislature to provide explicitly for a mechanism to implement that right necessitated a review of the history behind Act 111. The court emphasized the "occasion and necessity" for the enactment of the statute in order to determine whether the legislature intended grievance arbitration to be subjected to the "narrow certiorari" scope of review.

That examination revealed to the supreme court that the legislature clearly intended for Act 111 arbitration not to be

35 Id. at 474. Chirico also declared that a grievance must be arbitrated in accordance with Act 111. Id. As noted above, the supreme court did not mention the Uniform Arbitration Act in the Chirico decision. See Pennsylvania State Police, 656 A.2d at 87.
36 Pennsylvania State Police, 656 A.2d at 87.
37 Id.
38 Id.
39 Id. at 88. The court stated: "In the first section of Act 111, the legislature plainly declared that 'policemen or firemen ... shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of this act.'" Id. (alteration in original) (quoting PA. STAT. ANN. tit. 43, § 217.1).
40 Id.
41 Id. at 88 n.13.
impeded by litigation. A broad scope of review by an appellate court is one way for courts to intrude upon and tie up the arbitration process. Thus the sweeping "essence test" is contrary to the intent of Act 111.

Historically, the legislature enacted Act 111 after a period of instability in public sector labor law and a constitutional amendment. The legislature intended Act 111 to strike a balance between the necessity for guaranteeing public safety—a public interest goal—and the rights of the worker—a private, individual goal. To accomplish these ends the legislature took away the right to strike from policemen and firemen in Act 111, but gave them the right to bargain collectively and to pursue interest and grievance arbitration in return. This was presumably intended to strike a balance between public and private considerations. As a corollary, to enhance the rapid resolution of disputes in the interest of maintaining labor peace in the public safety sector, the legislature, in a provision of the Act, forbade appeals from arbitration awards. The purpose of the legislature in enacting this anti-appeal provision was to insure that the rapid resolution of disputes under arbitration could not be "delayed indefinitely through protracted litigation." Employing a broad scope of review such as the "essence test" would permit appellate courts to change Act 111 arbitration awards, which would constitute interference with the legislative scheme of the Act. Thus the only scope of review that is consistent with these legislative objectives is "narrow certiorari." Consequently, the Pennsylvania State Police decision explicitly holds that the scope of review for grievance arbitration is narrow certiorari.

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42 Id. at 89.
43 Id. at 89 n.15. Section 7 of Act 111 provides that "[n]o appeal [from an arbitration award] shall be allowed to any court." Id. (alterations in original) (quoting PA. STAT. ANN. tit. 43, § 217.7(a)).
44 Id. at 89. The opinion also noted that in the Chirico case, as well as in Appeal of Upper Providence, 526 A.2d 315, 320 (Pa. 1987), and Guthrie v. Borough of Wilkinsburg, 499 A.2d 570, 573 (Pa. 1985), the supreme court had "eschewed" judicial interference in grievance arbitration because it would totally thwart this objective of the Act. Pennsylvania State Police, 656 A.2d at 89.
45 Id.
46 Id.
The lengths to which the supreme court went to answer the issue in this case amply justified the fact that the commonwealth court had ordered reargument in the Pennsylvania State Police (Betancourt) case because of difficulty in identifying the applicable scope or standard of review in grievance arbitration cases arising under the Act.\textsuperscript{47} Although the supreme court's opinion makes the answer to the question appear obvious after the fact—as a well-written opinion should—the answer was not at all obvious prior to the time of the filing of that opinion. Nevertheless, it is difficult to argue with the conclusion of the supreme court.

In the first place, the "essence test," although used in the federal system, is the exception to the general rule. The United Steelworkers v. American Manufacturing case,\textsuperscript{48} as well as others, established the standard of review for arbitration awards in the federal system, and that test is similar to narrow certiorari.\textsuperscript{49} The commonwealth court's reliance on the use of the essence test in the federal system was arguably misplaced.

Second, the supreme court's treatment of the materials on legislative intent in Pennsylvania State Police is thorough and persuasive. When dealing with legislative intent, certainty is impossible. Still, it is difficult to argue with the supreme court's conclusion that an explicit statement in Act 111—that there is to be no appeal from arbitration—leads to a clear inference that judicial review should be of the narrowest possible scope. Of course, judicial review must be maintained in order to be consistent with separation of powers and the protection of constitutional rights. However, setting the standard as narrowly as possible, as the supreme court did in the Pennsylvania State Police opinion, remains consistent with the separation-of-powers doctrine, prevents a constitutional confrontation between the legislative and


\textsuperscript{48} 363 U.S. 564 (1960).

\textsuperscript{49} See, e.g., id. at 567-68; see also E. H. Schopler, Annotation, Matters Arbitrable Under Arbitration Provisions of Collective Labor Contract, 24 A.L.R.2d 752 (1952) (analyzing which matters are arbitrable under a voluntary arbitration agreement).
judicial branches, and gives effect to the legislative intent of Act 111. Thus the opinion is consistent with, and evinces a recognition of, the important constitutional structural functions that are served by the concept of scope of review.

In constitutional litigation, the term "scope of review" is recognized to involve and affect the ongoing relationship between the judicial branch, on the one hand, and the legislature and the agencies on the other. It defines the deference to be given toward decisions of agents of the legislature. It is axiomatic that if a court adopts a broad standard of review, such as the essence test implicated in the Pennsylvania State Police case, the judiciary's involvement in the class of litigation for which that scope has been established is much greater than when the scope of review has been narrowly designated, such as narrow certiorari. Consequently, this judicial involvement effectively limits the actions of agents of the legislature. As the commonwealth court itself acknowledged, under the essence test, reversals of grievance arbitration awards would be greatly increased.\(^{50}\) The supreme court perceived the nature of "scope of review" as a concept or procedure that, if broadly construed to assert a close rather than a particularly deferential judicial review of legislative delegations, such judicial review was contrary to the intent of the legislature—that the arbitrator's award be as final as possible while being consistent with the Pennsylvania Constitution. In doing so, the court properly defers to the legislature, its coequal branch, and assists in implementing the legislature's stated objective.

One additional matter should be noted. In Act 111, the legislature did not expressly specify the mechanism or procedure

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\(^{50}\) Pennsylvania State Police (Betancourt), 633 A.2d at 1282. In analyzing the effects of applying the essence test, the court stated as follows:

In grievance arbitration under Act 195, application of the error of law[-]judgment n.o.v. standard of review (or the "essence test") frequently results in reversing the arbitrator's determination of no just cause for discipline for imposing his or her own "brand of industrial justice," and going beyond the intention of the parties.

*Id.* (footnote omitted).
of arbitration for grievances.\textsuperscript{51} This omission arguably weakens the conclusion that the legislature intended arbitration of grievances under Act 111.\textsuperscript{52} However, in addition to the clear statements by the legislature that arbitration was provided in exchange for relinquishing the right to strike, and giving due consideration to the fundamental objective of keeping labor peace and preventing strikes in the public-safety sector, two other rationales justify the supreme court’s conclusion that the legislature intended grievance arbitration under Act 111. First, it may be that the legislature believed grievance arbitration so obviously flowed from all of the provisions of the Act that it was not necessary to specifically provide for it. In other words, the legislature may have believed that the inclusion of grievance arbitration was self-evidently within the purview of the Act and that therefore no explicit provision to this effect was necessary. In a sense, this analysis leads to the conclusion that at least some legislators thought about and had an actual intent for grievance arbitration to be utilized under the Act. Second, even assuming \textit{arguendo} that the legislature simply forgot to cover this item or did not think about it at all, the supreme court’s decision in \textit{Pennsylvania State Police} is still appropriate. In administrative law, the process of studying the history and purpose of the legislation, as well as the mischief that the legislature intended to remedy, is a familiar device to deal with ambiguity in statutory construction and interpretation.\textsuperscript{53} In fact, this process is the exact course of action that the supreme court took in the \textit{Pennsylvania State Police} decision.\textsuperscript{54} The court

\textsuperscript{51} See \textit{Pennsylvania State Police}, 656 A.2d at 88. Justice Cappy believed that the legislature’s intent to have Act 111 cover matters relating to grievance resolution was “\textsuperscript{[a]rguably . . . obscured by the legislature’s failure to provide as detailed a mechanism for grievance arbitration as it did for interest arbitration.} \textit{Id.}

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} This is also the process in Pennsylvania as set forth in the Statutory Construction Act, 1 PA. CONS. STAT. §§ 1921-1939 (1975).

\textsuperscript{54} \textit{Pennsylvania State Police}, 656 A.2d at 88. The court stated that “[t]o determine whether the legislature intended that grievance arbitration awards have a different scope of review from interest arbitration awards, we must review the history behind Act 111.” \textit{Id.} In a footnote, the court further stated as follows: “Where the legislature’s intent is questioned, this Court is instructed to look to
applied the principles of the Pennsylvania Statutory Construction Act and concluded that the more narrow scope of review is the only one consistent with the Act.\(^{55}\) Thus the justification for the Pennsylvania State Police decision is that the supreme court is clearly attempting to give effect to general legislative intent.

In sum, there is every reason to applaud this decision. It clears up confusion in an important area of the law and gives guidance to the intermediate appellate courts. The logic of the opinion is persuasive. The scope of review adopted is consistent with other types of arbitration under the Act. The decision is consistent with the purpose of the legislature in the Act and consistent with separation of powers between the branches.

Separation of powers concerns should lead the supreme court to continue to develop the body of law on scope or standard of review. This area is important for reasons that arise from the very structure of our government: it defines judicial deference to legislative action and, in part, the relationship between the judiciary and the legislature.

III. DUE PROCESS

A. Pennsylvania Game Commission v. Marich

In Pennsylvania Game Commission v. Marich,\(^{56}\) the defendants violated regulations of the Pennsylvania Game Commission (Commission) that placed a limit on killing sea ducks.\(^{57}\) They executed a Field Acknowledgement of Guilt form and paid a fine. Subsequently, after a hearing before an officer from the Bureau of Law Enforcement of the Commission on the issue of whether mitigating circumstances existed, their hunting licenses were suspended for a period of one year.\(^{58}\) The

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\(^{55}\) Id. at 88 n.13 (citing 1 Pa. Cons. Stat. § 1921(c)).

\(^{56}\) 666 A.2d 253 (Pa. 1995). Unless otherwise noted, the following facts are taken from Marich, 666 A.2d at 254-55.


\(^{58}\) Marich, 666 A.2d at 254.
defendants appealed to the commonwealth court on the basis that the
hearing violated the due process principles set forth in Lyness
v. State Board of Medicine. The commonwealth court agreed
and reversed the Commission’s decisions, holding that there was
a commingling of prosecutorial and adjudicative functions that
violated defendants’ procedural due process rights. The
Commission appealed on the basis that neither the applicable
provisions of the Pennsylvania Constitution nor United States
Constitutions provide due process protections for a hunting
license. The Pennsylvania Supreme Court agreed with the
Commission and reversed the commonwealth court’s decision.

The supreme court equated the due process protections
provided by the Pennsylvania Constitution with those provided by
the United States Constitution. However, according to the court,
procedural due process guarantees, and consequently the Lyness
analysis that follows from them, do not attach until a determination
is made that a "protected liberty or property right" is present.
Therefore, a determination that a constitutionally protected liberty
or property right has been violated is a condition precedent to due
process analysis.

The Pennsylvania Supreme Court stated that the three-prong

60 Marich v. Pennsylvania Game Comm’n, 639 A.2d 1345, 1347 (Pa.
61 Article I, section 1 of the Pennsylvania Constitution provides that "[a]ll
men are born equally free and independent, and have certain inherent and
indefeasible rights, among which are those of enjoying and defending life and
liberty, of acquiring, possessing and protecting property and reputation, and of
pursuing their own happiness." PA. CONST. art. I, § 1.
62 The applicable provision of the United States Constitution is the
Fourteenth Amendment. Section 1 of that amendment provides that no state shall
"deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.
64 Id. at 257.
65 Id. at 255 n.6. Therefore, the same analysis applied to the petitioner’s
claims under both the Pennsylvania Constitution and the United States
Constitution.
66 See id. at 255-56.
test announced in *Mathews v. Eldridge*\(^{67}\) is to be utilized in determining whether a person's Fourteenth Amendment due process guarantees have been violated.\(^{68}\) However, Justice Zappala correctly noted that, before due process requirements attach, a court must first determine whether the interest in question is constitutionally protected. Justice Zappala noted that the United States Supreme Court, in *Board of Regents of State Colleges v. Roth*,\(^{69}\) stated that such a determination should focus upon the character or type of private interest of which deprivation has been claimed.\(^{70}\) Both the Pennsylvania Supreme Court and the United States Supreme Court have recognized that state law determines the nature of the individual right involved and, hence, whether it is entitled to due process protection.\(^{71}\) Thus a Pennsylvania claimant must first establish, and a court must first decide, that a liberty or property interest exists as an initial, isolated step. If no property or liberty interest is found to exist, there is no corresponding right to the protection of due process.

Applying this analysis to the present case, the Pennsylvania Supreme Court concluded that the neither Pennsylvania nor federal precedents recognized a property right in a hunting license.\(^{72}\) Hunting is a "recreational sport," which is merely a privilege that

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\(^{68}\) *Marich*, 666 A.2d at 256. The *Mathews* test is a cost-benefit analysis that consists of weighing three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation through the process used and the probable value that added procedural safeguards will increase accuracy; and (3) the public interest, which includes fiscal and administrative burdens that additional procedures may require. *Mathews*, 424 U.S. at 335.

\(^{69}\) *Roth*, 408 U.S. 564 (1972).

\(^{70}\) Justice Zappala reasoned that when determining "whether due process requirements apply, we must look not to the 'weight' but to the nature of the interest at stake." *Marich*, 666 A.2d at 256 (citing *Roth*, 408 U.S. at 570-71). The court has "held that 'there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause.'" *Id.* (quoting *R. v. Department of Pub. Welfare*, 636 A.2d 142, 147 (Pa. 1994)).

\(^{71}\) *Id.*; see *Paul v. Davis*, 424 U.S. 693, 710-11 (1976); *R.*, 636 A.2d at 147.

\(^{72}\) *Marich*, 666 A.2d at 256-57.
does not implicate a property or liberty interest. Further support for the court’s determination that a hunting license was not a protected property right is the Pennsylvania Constitution, which provides that the natural resources and the public estate are matters that the state is instructed to conserve for the public good. Unlike other types of licenses that Justice Zappala characterized as involving property interests, such as professional licenses, a hunting license is not sufficiently important to merit the protection of due process. Because the court held that a hunting license was not a constitutionally protected property interest, it therefore never applied the Mathews test to determine whether the requirements of due process had been sufficiently afforded.

Although the Marich opinion appears to be simple and straightforward, there are several less obvious matters that deserve comment. The first is the nature of the classification scheme that the Pennsylvania Supreme Court employed. The court employed a right-privilege approach to examine the alleged property interest. This mode of analysis has been severely criticized and rejected for many years because of the constitutional problems and unfairness that the doctrine is alleged to have created. Second, the decision arguably misconstrued the federal cases on procedural due process.

In Goldberg v. Kelly, the United States Supreme Court

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73 Id.
74 Id. at 256. Presumably, the Court means that individual rights and interests must therefore be limited because of intense state regulation.
75 Id. at 257.
76 Id.
rejected the right-privilege distinction and attempted to construct an entirely new test for defining the private interests that may trigger due process protection. That test consisted of an authorization or entitlement test: if a statute entitles a person to benefits or state action—for example, money payments, a license, or a contract—and if the private loss would not be minimal, then due process rights attach. The Mathews court, in applying the three-prong test, used the criteria and approach of the Goldberg case throughout in describing the private interest at stake; it did not, however, use the right-privilege distinction. The Marich court simply ignored that precedent.

The Pennsylvania Supreme Court’s use of the Roth case as precedent or as a model is also questionable. The supreme court was accurate in explaining that the Roth case held that the nature of the private interest involved is the crucial initial inquiry and that due process does not attach until the court finds a protected interest. But the test employed in Roth did not turn on a right or privilege characterization. In fact, the Roth case expressly rejected the right-privilege approach in unmistakable terms:

In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a "privilege," not a "right," and that procedural due process guarantees therefore were inapplicable. The basis of this holding has been thoroughly undermined in the ensuing years. For, as MR. JUSTICE BLACKMUN wrote for the Court only last year, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" The concept that the United States Supreme Court employed throughout the Roth case was whether the benefit or claim was

79 Id. at 262. One commentator stated that the most important aspect of the case was the "[United States Supreme] Court's specific rejection of the privilege concept." BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 5.15 (3d ed. 1991).
80 Goldberg, 397 U.S. at 262-63.
82 Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571-72 n.9 (1972) (citations omitted).
created by law, a test that is consistent with the approach of the Goldberg and Matews cases. It is certainly true, as Justice Zappala pointed out, that the United States Supreme Court in Roth held that state law defines a large area of protected interests, especially in the twentieth century. However, at no point did the Roth Court actually use, intimate, or approve the idea that state law which creates or defines interests triggering due process protection are, or should be, any version or variant of the right-privilege distinction.

Additionally, the Marich court did not even mention the case of Perry v. Sindermann, the companion case to Roth. In Perry, the United States Supreme Court held that the possibility of an implied contract to continue employment was sufficient to withstand a motion for summary judgment in language that drew on Roth and made explicit the nature of the test or approach employed there:

We have made clear in Roth that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings.

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83 The Roth Court discussed the nature of property rights and procedural due process in the following terms:

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

_id._ at 577.

84 Id.

85 See _id._ at 566-92.

86 408 U.S. 593 (1972).
that support his claim of entitlement to the benefit and that he may invoke at a hearing.\textsuperscript{87}

The approach that the Court began in \textit{Goldberg} and continued in \textit{Mathews}, \textit{Roth}, and \textit{Perry} is one of statutory authorization or entitlement and in no way turns on the label placed on the interest involved as a "right" or "privilege." The language in the \textit{Marich} opinion that appears to rely on the nature of a hunting license as a mere privilege invoked this test, which has created so much mischief and constitutional difficulty in the federal system.\textsuperscript{88} The federal courts have utterly rejected the right-privilege test and the assumption in the \textit{Marich} opinion that it is still in use is based upon old, overruled federal cases. In addition, the labels "right" and "privilege" explain nothing about what is or is not a property right. Thus the test lacks predictive force. It expresses a conclusion and a labelling for which no guidelines are given. It is to be hoped that the court will consider developing a more useful and predictive test or in some fashion refine the test that is presently being used.

\textbf{B. Stumpp v. Stroudsburg Municipal Authority}

In a second case addressing due process, the Pennsylvania Supreme Court classified another potential interest as lacking any property characteristics and therefore not entitled to due process protection. In \textit{Stumpp v. Stroudsburg Municipal Authority},\textsuperscript{89} the supreme court held 'that a promise made by a municipal authority to retain an employee until he retired did not create a property

\textsuperscript{87} \textit{Id.} at 601 (citations omitted).

\textsuperscript{88} The author should not be understood as encouraging the Pennsylvania Supreme Court to employ exactly the same test as the federal courts. The state courts are free to develop their own tests for property or entitlement and have the authority to do so. Also, it may well be that the Pennsylvania courts will wish to develop a wholly new or better test for defining the nature of the interest that will trigger the right to due process. However, the Pennsylvania Supreme Court should not rely on federal decisions for propositions that are not supported by those federal cases. To do so prevents the true nature of the issues involved from being examined and decided properly.

\textsuperscript{89} 658 A.2d 333 (Pa. 1995).
The employee worked for a municipal water authority. The authority sent him a letter stating that he was terminated as manager of the water plant but that he could continue to work as a water plant operator until he retired, if he so chose. The letter then asked him to notify the employer if he wished to continue employment in this capacity and in order to settle upon a salary. The employee notified his employer as requested. Nevertheless, after working in the lesser position, the water authority terminated his employment. The employee filed suit in the Court of Common Pleas of Pennsylvania, which dismissed his suit because it found that there was no statute granting the water authority the right to enter into contracts.

The commonwealth court reversed the court of common pleas on the basis that there was a property interest because there was an expectation created by the language from the water authority’s letter, which approached that of an implied contract, and because the claimant had raised the doctrine of equitable estoppel but had not had an opportunity to present or develop his argument in this respect. As to the "almost"-implied-contract basis for the holding, the commonwealth court reasoned that the terms of the letter were "so unequivocal" that they created in the claimant "an expectation of continued employment pursuant to what could be deemed, in effect, an implied contract." On the equitable estoppel issue, the court held that by relying on the promise, the plaintiff’s case had fallen within the parameters of the equitable estoppel doctrine, which, in order to be applied against a government agency, requires that the agency "intentionally or negligently misrepresent[] some material fact and induce[] a party to act to his or her detriment, knowing or having reason to know the other party w[ould] justifiably rely on the misrepresentation."

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90 Unless otherwise noted, the following facts are taken from Stumpp, 658 A.2d at 333-34.
92 Id.
93 Id. at 737 (quoting Bolduc v. Board of Supervisors, 618 A.2d 1188 (Pa. Commw. Ct. 1992), appeal denied, 625 A.2d 1195 (Pa. 1993)).
The supreme court expressly rejected both of the rationales offered by the commonwealth court. Justice Cappy reasoned that the plaintiff could not recover for several reasons. First, he noted that, as a preliminary matter, the supreme court had clearly established in several cases that municipal employees serve at will and that municipalities are without the power to enter into employment contracts with employees because the legislature has never given them the power to do so.94 Second, he invoked various contract doctrines to reach the conclusion that the commonwealth court erroneously concluded that there was an implied contract between the municipality and the employee.95 Third, he pointed out a precedential opinion in which the supreme court had held that the doctrine of equitable estoppel was not applicable to government employee dismissal cases.96

As the court forcefully asserted, the outcome in this case was consistent with precedent in Pennsylvania that government

94 Stumpf, 658 A.2d at 334. The court noted that "[a]s an initial matter, the Authority simply does not have the power under law to enter into contracts of employment that contract away the right of summary dismissal, since the power to confer tenure must be expressly set forth in the enabling legislation." Id.

95 Id. at 335. Justice Cappy opined:

In the instant case, it is very questionable whether the Authority's words could be reasonably construed to be an offer for a definite term of employment, with all the attendant rights and privileges that accompany contractual employment. Moreover, even if there was an "offer" for contractual employment which could be accepted, the requisite consideration to support the contract is missing. The law is clear that an employee must give his employer "additional" consideration other than the services for which he was hired. Additional consideration exists when an employee affords his employer a substantial benefit other than the services which the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform. Here, the Authority's letter of February 7, 1992, makes clear that Appellee was being fired from his position as Manager and was offered the position of Plant Operator as a substitute. Thus, contrary to Appellee's assertion that he "gave up" something of value in accepting the demotion, Appellee's only alternative was to be unemployed.

Id. (citation omitted).

96 Id.
employment is at will in the absence of a contract. Furthermore, the analysis that a municipality is not authorized, and thus lacks the capacity to enter into contracts with its employees because the legislature has not conferred such power upon it, seems unexceptionable. It is a well-known and established principle of the law of municipal organizations that local government entities have only the power that the legislature confers upon them. In the area of municipal employment, this principle has been refined into the axiom that all public employees are at will, unless the legislature has seen fit to confer upon them tenure under the civil service statutes. Thus any attempt to enter into an employment contract with a municipal employee fails. Unlike contracts entered into with minors and persons with mental infirmities, which are voidable and can be enforced under certain circumstances, municipal employees' contracts appear to be void.

This result is apparently consistent with the will of the legislature, which appears to have expressed the intent that only employees protected by civil service statutes can enjoy tenure that will entitle them to due process protection under Pennsylvania law. It should be added that the result in Stumpf is also consistent with interbranch relations between the legislature and judiciary. The supreme court deferred to what appears to be the will of the legislature and insisted upon legislative authorization to support a finding that a protected expectation or property interest exists in government employment sufficient to trigger due process protection.

But the court should have stopped with its lack of authorization-capacity and employment-at-will analysis. The appeal could have been persuasively and completely reasoned and explained on the basis of those two doctrines alone. The explanation that the supreme court was compelled to provide

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regarding the reasons why there was no contract was incomplete. The court made sweeping conclusions about contract law that may be true occasionally, but may be misleading in the present context. For example, a communication does not have to contain every relevant term in order to constitute an offer. If the parties regard the communication as an offer, and if it refers to external criteria or standards that give it additional content, then it may constitute an offer.\textsuperscript{100} This is especially true when a course of behavior or conduct between the parties shows that they so regard it. Also, if one of the parties can show reliance, then a court may be more willing to find that an offer, and hence an enforceable promise or contract, existed. The supreme court's language may be overly conclusory and sweeping on this issue.

A second difficulty with the court's contract analysis is its treatment of the law of consideration. On one hand, one party to an employment contract cannot simply unilaterally change the terms of that contract. The preexisting duty of the promisor prevents any consideration from being recognized.\textsuperscript{101} However, provided that both parties are willing to modify the contract, \textit{any} change in the duties of the employee will serve as consideration for a new contract.\textsuperscript{102} It is clear in the \textit{Stumpp} case that the duties of the employee were changed when he was made into a

\begin{footnotesize}
\textsuperscript{100} Section 33, comment a of the \textit{Restatement (Second) of Contracts} provides as follows:
\begin{quote}
\textit{Certainty of terms.} It is sometimes said that the agreement must be capable of being given an exact meaning and that all the performances to be rendered must be certain. Such statements may be appropriate in determining whether a manifestation of intention is intended to be understood as an offer. But the actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon. In such cases courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain.
\end{quote}
\end{footnotesize}
plant operator. Thus, under this contract principle, there would be sufficient consideration for a new contract.

In conclusion, the supreme court’s analysis of the first two issues—employment at will of municipal employees and legislative intent in this area—was clear, logical, and persuasive. The analysis of the other issues, especially the contract analysis, failed to explain why or how a line of reasoning only narrowly distinguishable—if distinguishable at all—from reasoning that would lead to the opposite result is applicable to the case. Also, it is at least arguable that the court’s application of contract law appears to contradict several common law principles.

IV. SEPARATION OF POWERS: COMMONWEALTH EX REL. JIULIANTE V. COUNTY OF ERIE

The Pennsylvania Supreme Court, in Commonwealth ex rel. Jiuliante v. County of Erie, addressed a dispute between the executive and judicial branches of the Pennsylvania state government. The supreme court resolved the controversy in favor of the judiciary on separation-of-powers principles.

The Commissioners of Erie County (Commissioners) adopted an antinepotism ordinance. Thomas Antolik was appointed to the position of Chief Juvenile Probation Officer by order of the Court of Common Pleas of Erie County. Erie County personnel officials refused to hire Antolik because his brother had been hired several months earlier as a juvenile probation officer. A judge entered an order for the Commissioners to hire Antolik.

The Commissioners appealed the order to the Commonwealth Court of Pennsylvania. The commonwealth court held that, because the antinepotism ordinance was applicable to judicial personnel, it was unconstitutional. The court explained that any statute directly interfering with the hiring, retention, or termination of judicial employees violates the inherent power of the judiciary to do "all such things as are reasonably necessary for

104 Unless otherwise noted, all facts are taken from Jiuliante, 657 A.2d at 1247-48.
the administration of justice."\textsuperscript{106}

After the supreme court denied allocatur, the law firm representing the common pleas judges submitted a bill for services in prosecuting the appeal, which the Erie County Court of Common Pleas ordered the Commissioners to pay. The Commissioners, however, refused to do so.

The court administrator for the Erie County Court of Common Pleas then submitted the attorney’s bill to the Administrative Office of the Pennsylvania Courts (AOPC) with a request for payment. Chief Legal Counsel for the AOPC responded with the advice that Erie County was responsible for payment of the bill. The Chief Judge of the Erie County Court of Common Pleas then entered an ex parte order that commanded Erie County to pay the bill. Erie County appealed to the commonwealth court on the basis that the AOPC’s decision violated its due process rights because the order to pay was entered without notice and an opportunity to be heard. The commonwealth court agreed, vacated the ex parte order, and remanded the case to the court of common pleas with leave for the common pleas judges to file a complaint. The common pleas judges sought allocatur from this decision, which the supreme court denied.

The common pleas judges then filed a complaint in mandamus, seeking recovery of the legal fees from Erie County. Erie County moved for summary judgment, which the designated judge, Senior Judge Breene of the Venango County Court of Common Pleas, granted.\textsuperscript{107} The commonwealth court granted summary judgment, in part, on the basis that Erie County’s refusal to pay did not endanger the administration of justice. Two judges filed a dissenting opinion in which they asserted that the county had a duty to pay the legal fees because the actions that Erie County took constituted an intrusion into the internal operations of the court of common pleas. The Pennsylvania Supreme Court then granted

\textsuperscript{106} Id.

\textsuperscript{107} The supreme court appointed Judge Breene to preside over the matter in Erie County to ensure impartiality. See Jiuliante, 657 A.2d at 1246. On December 8, 1992, Judge Breene heard oral argument on Erie County’s motion for summary judgment and immediately issued an order from the bench granting summary judgment in the county’s favor. Id. at 1248.
allocatur.

The common pleas judges made three principal arguments: (1) that the legislature imposed a statutory duty on the counties to fund the courts; (2) that the duty arises from the judiciary’s inherent authority to insure its independence; and (3) that there are compelling public policy reasons for county funding of the expenses of the judiciary.\textsuperscript{108} Erie County responded that the applicable statute\textsuperscript{109} did not include legal services as the type of goods or services that a county was bound to provide to the courts.\textsuperscript{110}

The supreme court found that the statute authorized the payment of legal fees in the normal course of judicial operations.\textsuperscript{111} The court reasoned that the legislature intended the term "services" in the statute to include legal services, for such services were clearly foreseeable and part of the normal operations of the judiciary.\textsuperscript{112} However, the supreme court could not find any authorization for the payment of legal fees of the "extraordinary" nature involved in this case.\textsuperscript{113} Because the court found no statutory authorization, it turned to the question of whether constitutional or separation-of-powers principles provided support for such payment.

The supreme court concluded that constitutional principles of

\textsuperscript{108} Id. at 1249.

\textsuperscript{109} The statute at issue was title 42, section 3722 of Pennsylvania Consolidated Statutes. 42 PA. CONS. STAT. § 3722 (1990). Section 3722 provides as follows:

Except as otherwise provided by statute, each county shall continue to furnish to the court of common pleas and community court embracing the county, to the minor judiciary established for the county and to all personnel of the system, including central staff entitled thereto, located within the county, all necessary accommodations, goods and services which by law have heretofore been furnished by the county.

\textsuperscript{110} Jiuliante, 657 A.2d at 1249.

\textsuperscript{111} Id.

\textsuperscript{112} Id.

\textsuperscript{113} Id.
separation of powers dictated that Erie County pay the legal fees. Justice Zappala concluded that in both prior cases, the plaintiff courts failed to meet their heavy burden of establishing an exception to the general rule that a litigant cannot recover legal fees from an adversary without statutory authorization, a clear agreement of the parties, or pursuant to some other exception. But these considerations were not, he stated, dispositive of this case if an exception existed in Jiuliante that did not exist in the earlier cases. He then turned to an examination of principles of separation of powers to determine whether an exception was warranted.

Justice Zappala’s reasoning consisted of standard separation-of-powers analysis. First, the three branches of government are separate, independent, and co-equal. The powers of the three branches are separate, and the separation-of-powers doctrine is intended to preserve this separateness in order to prevent one branch of government from usurping the powers or functions of another. Thus each branch exercises a "checking" function over the others under the principle of separation of powers. Under this notion of separation of powers, the judiciary inherently possesses certain powers "to preserve the efficient and expeditious administration of Justice and protect it from being impaired or destroyed." In Jiuliante, the supreme court concluded that the

114 Id. at 1252.
115 Id. at 1250. The Jiuliante court distinguished Lavelle v. Koch, 617 A.2d 319 (Pa. 1992), and Snyder v. Snyder, 620 A.2d 1133 (Pa. 1993). The court distinguished these cases on the grounds that both of these cases did not "involve[] a successful challenge by the judiciary to actions by another branch of government that interfered with the inherent authority of the judiciary." Jiuliante, 657 A.2d at 1250.
116 Jiuliante, 657 A.2d at 1250.
117 Id. at 1251.
118 Id. at 1252 (citing THE FEDERALIST No. 47 (James Madison)); see BLACK’S LAW DICTIONARY 1365 (6th ed. 1990).
119 Jiuliante, 657 A.2d at 1252.
120 Id. (quoting Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971)).
independence of the judiciary warranted the exception in order to prevent the intimidation of the judiciary as well as to protect the courts from being forced to deplete financial resources in defending its personnel selections to the detriment of its constitutional role.\textsuperscript{121} The court noted that, in this case, the county challenged the reasonableness of the attorney’s fees. Consequently, the supreme court concluded that, although Erie County was liable for the legal fees based on the separation-of-powers principle, an issue of reasonableness remained, and the case was therefore remanded to the lower court for further proceedings to determine whether the legal fees were reasonable.\textsuperscript{122}

The general tenor of the opinion is difficult to fault. Every lawyer believes in separation of powers and the independence of the judicial branch, for independence is a requirement for the neutrality that we expect of our judges. Justice Zappala’s reliance on Madison for his separation of powers rationale is one version of that doctrine.\textsuperscript{123} Furthermore, the need for an independent judiciary and the division or allocation of power between the three branches is also generally accepted. On this score, the opinion is on solid ground.

There are, however, some difficulties with the opinion. The court relied on two precedents that involved attorney’s fees, \textit{Lavelle v. Koch}\textsuperscript{124} and \textit{Snyder v. Snyder}.\textsuperscript{125} These cases stand for the principle that the judiciary is a separate, co-equal branch of government with the inherent power to defend its function.\textsuperscript{126}

\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.}
\textsuperscript{124} 617 A.2d 319 (Pa. 1992).
\textsuperscript{125} 620 A.2d 1133 (Pa. 1993).
\textsuperscript{126} \textit{Juliante}, 657 A.2d at 1250.
That inherent power can be used to compel expenditures by a court if they are "necessary to prevent the impairment of [the court's] exercise of the judicial power or the proper administration of justice."\textsuperscript{127} The \textit{Jiuliante} court distinguished these cases on the basis that they did not "involve[] a successful challenge by the judiciary to actions by another branch of government that interfered with the inherent authority of the judiciary."\textsuperscript{128} Thus facts that would justify the invocation of the exception to compel expenditures did not exist in \textit{Lavelle} and \textit{Snyder}, but they did exist in \textit{Jiuliante}. Because the supreme court in \textit{Jiuliante} concluded that exceptional circumstances existed, it could therefore invoke the doctrine of separation of powers and the judiciary's inherent authority to compel expenditures as a justification for compelling the payment of attorney's fees. These circumstances justified invoking the inherent power of the judicial branch to compel those expenditures it deems necessary to prevent impairment of its discharge of the judicial power.\textsuperscript{129}

However, the court had available a widely recognized device for avoiding this constitutional conflict with the legislature. The court considered and rejected the argument that title 42, section 3722 of Pennsylvania Consolidated Statutes,\textsuperscript{130} which provides that the counties have the primary responsibility for funding the courts, would include the duty to pay attorney's fees. Judge Pellegrini, in his dissent from the commonwealth court opinion, argued that the statute did include such a duty.\textsuperscript{131} He did not analyze the statutory language, but concluded generally that, because there was a statute in effect that required county funding, the obligation to pay reasonable attorney's fees arose under it.

\begin{itemize}
\item \textsuperscript{127} \textit{Lavelle}, 617 A.2d at 321; see \textit{Snyder}, 620 A.2d at 1136.
\item \textsuperscript{128} \textit{Jiuliante}, 657 A.2d at 1250.
\item \textsuperscript{129} \textit{Id.} at 1252.
\item \textsuperscript{130} For the text of 42 PA. CONS. STAT. § 3722, see supra note 109.
\item \textsuperscript{131} \textit{Jiuliante}, 657 A.2d at 1249. The court stated that "[w]e do not conclude, however, that Section 3722 was intended to impose an obligation upon the counties to pay for legal fees incurred during litigation of the extraordinary nature of this case." \textit{Id.}
\end{itemize}
because of the needs of separation of powers.\textsuperscript{133} Therefore, without extending the meaning of the statutory language, one could easily interpret the statute to include legal fees. The statute includes the language that the counties will provide the "goods and services" necessary for the operation of the courts, and services can easily include legal fees within its meaning, a matter which Justice Zappala conceded in the supreme court opinion.\textsuperscript{134}

There is an additional argument for an interpretation that the statutory language mandates the inclusion of attorney's fees. There is a doctrine in constitutional law that requires courts engaged in potential constitutional confrontations with the legislature to adopt the construction of a statute that eliminates the need for a decision on constitutional grounds.\textsuperscript{135} As was suggested by Judge Pellegrini in his dissent from the decision of the commonwealth court, by employing a particular construction of the statute involved—namely, that the services portion of the "goods and services" statutory language requiring county funding includes legal fees—the issue could have been resolved on a statutory rather than constitutional basis. Reaching the same result by employing this analysis could have occurred without endangering the constitutional function and dignity of the judiciary. If the supreme court believed that it was forced to act on a constitutional basis because it might give up some power or create some principle that would later become an adverse constitutional precedent, such a perceived danger could have been avoided by simply stating that the court was not reaching the constitutional issue because the statute's language provided a sufficient basis for resolving the issue. In this manner, by disclaiming any constitutional overtones,

\textsuperscript{133} \textit{Id.} at 1127 (Pellegrini, J., dissenting). Judge Pellegrini stated that, "[b]ecause the counties are still required to fund the judicial districts, I believe that they still have a continuing legal obligation to fund all services, including legal services, necessary for the judicial districts to function." \textit{Id.}

\textsuperscript{134} \textit{See} \textit{Jiuliante}, 657 A.2d at 1249.

\textsuperscript{135} \textit{See} \textit{National Cable Television Ass'n v. United States}, 415 U.S. 336, 342 (1974) (stating that the Court would construe the statute in question narrowly to avoid constitutional problems); \textit{Kent v. Dulles}, 357 U.S. 116, 128, 130 (1958) (holding that the Court would not reach the constitutional question at issue because it refused to adopt an interpretation of the statute in question that was contrary to Congress' explicit meaning).
the supreme court would have avoided being constitutionally bound in the future, and it would also have been clear that Erie County was responsible for the legal fees involved.

One could question why the supreme court took this constitutional approach when statutory interpretation would have led to the conclusion that the legal fees were included in the term "services" as used in section 3722. This choice can probably be explained in terms of the nature of the language used to express the powers and duties of the judiciary, which were written into the Pennsylvania Constitution at the Constitutional Convention in 1968, and the judicial interpretation in separation-of-powers terms which that language has invited. Unlike many other state constitutions and the United States Constitution, which have "blended" or shared constitutional powers to some extent, the interpretation of the Pennsylvania Constitution, at least as it pertains to the operation of the Pennsylvania courts, has adopted the concept of complete and exclusive separation since 1963.

With regard to the supervisory and administrative oversight of the judiciary and matters relating to judicial operations, the amendments to the Pennsylvania Constitution enacted at the 1968 Pennsylvania Constitutional Convention did, indeed, insert very broad language to describe the powers of the Pennsylvania Supreme Court; but it is probable that the drafters did not realize the extent of the power they were vesting in the supreme court. Regardless of what the constitutional assembly delegates

136 For a complete and enlightening discussion of this idea, see Geyh, supra note 123, at 1051. The discussion that follows in the text draws heavily upon Professor Geyh's article.

137 Professor Geyh notes that James Madison emphatically made the point that "absolute" and "explicit" separation of powers are unworkable. The powers of the three branches must be "connected and blended" or else a "free government[] can never in practice be duly maintained." Id. (quoting THE FEDERALIST No. 48 (James Madison)).

138 See id. at 1054-57 (discussing the expansion of the Court's independence).

139 Id. at 1059-61.
intended, the constitutional language they used\textsuperscript{140} led the supreme court, relying on a plausible interpretation of that language, to assume the exclusive power to regulate the affairs of the entire judicial branch.\textsuperscript{141} Given that constitutional provision and the constitutional cases that have interpreted it prior to the \textit{Jiuliante} case,\textsuperscript{142} it is not surprising that the supreme court should rely on its inherent power to defend the functioning of the judiciary. It would appear that the amendments to the Pennsylvania Constitution have led to the understanding that Pennsylvania has complete and absolute separation of powers as between the legislature and judiciary, as distinguished from "blended" or interdependent powers. Thus the court will invoke its inherent power to defend the functioning of the judiciary whenever it has the opportunity to do so, as well as whenever it is presented with a case involving matters that the court perceives might impede or interfere with the efficient and sound operation of the courts. Instead of blending constitutional powers that might lead to cooperation, at least in situations where one of the branches is not exercising a checking function on the other, total separation leads to, or encourages, confrontation. Under the view of separation of powers that has developed in Pennsylvania jurisprudence, the Pennsylvania Supreme Court is not merely one of the overseers responsible for

\textsuperscript{140} Article V, section 10(c) of the Pennsylvania Constitution provides that "[t]he Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . including the power to provide for . . . the administration of all courts and supervision of all officers of the Judicial Branch." PA. CONST. art. V, § 10(c).

\textsuperscript{141} Geyh, supra note 123, at 1056.

\textsuperscript{142} See Garrett v. Bamford, 582 F.2d 810, 814 (3d Cir. 1978) (interpreting section 10(c) of the Pennsylvania Constitution to mean that "the state's supreme court [has] exclusive power to establish rules of procedure for the state courts"); Kremer v. State Ethics Comm'n, 469 A.2d 593, 595 (Pa. 1983) (finding that a financial disclosure provision under the Ethics Act was unconstitutional because it violated the court's supervisory power); \textit{In re} 42 Pa. C.S. § 1703, 394 A.2d 444, 450 (Pa. 1978) (declaring that 42 PA. CONS. STAT. § 1703 (1990), which mandated public notice of judicial rulemaking sessions, was unconstitutional because it violated section 10(c) of the Pennsylvania Constitution). For a discussion of these and other related cases, see Geyh, \textit{supra} note 123, at 1056-61.
the soundness of the judicial system—as it would be under a blended or interdependent view of separation of powers. Rather, it is the sole entity responsible for the sound functioning of the judiciary in Pennsylvania, and thus it is only natural that it would perceive its duty to be to defend the operations of the judiciary from any intrusion by another branch.

V. SOVEREIGN IMMUNITY: FINN v. PHILADELPHIA

Another significant case decided by the Pennsylvania Supreme Court in 1995 was Finn v. Philadelphia,143 a sovereign immunity case. In the Finn case, the plaintiff was injured when she fell on a Philadelphia sidewalk that was covered with grease. She brought an action in which she sought damages from the city under the "sidewalk exception" to the Sovereign Immunity Act (Act).144

The plaintiff argued that the grease constituted a "dangerous

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144 42 PA. CONS. STAT. §§ 8541-8564 (1990 & Supp. 1995). The portion of the statute that is relevant for the present case is § 8542(b)(7), which provides as follows:

(b) Acts which may impose liability.—The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:

(7) Sidewalks.—A dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition. When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.

Id. § 8542(b)(7).
condition" that entitled her to recovery under the Act.\textsuperscript{145} The city argued that the court must strictly construe exceptions to governmental immunity and that, in this situation, the term "strict construction" meant that a plaintiff had the burden of proving that an artificial condition of the sidewalk itself caused the injury or damages.\textsuperscript{146} Under this theory, because the grease did not originate in or from part of the structure of the sidewalk, the municipality was not liable.

The majority held that the plaintiff could not recover because she did not meet the requirements for establishing the "sidewalk exception" to the Act.\textsuperscript{147} Basing its holding on a rule of construction, the court reasoned that the legislature's intent generally was to provide for sovereign immunity in the Act.\textsuperscript{148} The court found this intent in the circumstances surrounding the enactment of the Act. In 1978 the Pennsylvania Supreme Court abrogated the common law doctrine of sovereign immunity in \textit{Mayle v. Pennsylvania Department of Highways}\textsuperscript{149} and, in response to this decision, the legislature reestablished the sovereign immunity doctrine in the Act.\textsuperscript{150} Thus, the court reasoned, the general intent of the Act is to establish rather than limit sovereign immunity. However, the majority went on to conclude that, in contrast to that general legislative intent to recreate immunity, the provision involved in the \textit{Finn} case was an exception to the Act.\textsuperscript{151} The next step of the court's reasoning represented the essence of its decision: because the overall, general intent of the legislature was to establish sovereign immunity for Pennsylvania, and because exceptions such as the sidewalk exception pierce that immunity and are thus are conceptually inconsistent with the overall legislative scheme of sovereign immunity, the court must give effect to the intent of the legislature by construing the

\textsuperscript{145} \textit{Finn}, 664 A.2d at 1343.
\textsuperscript{146} \textit{Id.} at 1343-44.
\textsuperscript{147} \textit{Id.} at 1346.
\textsuperscript{148} \textit{Id.} at 1344.
\textsuperscript{149} 388 A.2d 709 (Pa. 1978).
\textsuperscript{150} \textit{Finn}, 664 A.2d at 1344.
\textsuperscript{151} See \textit{id.} at 1346.
exceptions as narrowly as possible.\textsuperscript{152}

The balance of the majority opinion consisted of applying this canon of construction and reviewing precedents. First, the court examined the text of the statute for guidance. The sentence that follows the "dangerous condition" language of the statute pertains to the "installation and repair"\textsuperscript{153} of sidewalks. According to the majority, this language refers to the "physical condition of the sidewalks themselves," and not "objects or substances" on the surface of the sidewalks as in the case here.\textsuperscript{154}

Second, the court turned to its major precedents that had implicated the same problem. The court noted that there were apparent inconsistencies among three earlier supreme court cases on this subject.\textsuperscript{155} The first of these cases was \textit{Bendas v. Township of White Deer}.\textsuperscript{156} In the \textit{Bendas} opinion, the court observed that it had previously held that, where the Commonwealth has a legal duty—for example, as it does over highways and sidewalks to make them safe for their intended use—the issue of defining a dangerous condition for purposes of the Act is a question of fact for the jury.\textsuperscript{157} The second precedent the court examined was \textit{Mascaro v. Youth Study Center}.\textsuperscript{158} In \textit{Mascaro}, a detainee with a violent history at a youth detention center escaped and terrorized the plaintiffs.\textsuperscript{159} The court held that it had established that the real estate exception to sovereign immunity exists only in situations where an "artificial defect" of

\textsuperscript{152} \textit{Id.} at 1344.
\textsuperscript{153} The full sentence to which the Court refers is as follows:
When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.
\textsuperscript{154} \textit{Finn}, 664 A.2d at 1345.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} 611 A.2d 1184 (Pa. 1992).
\textsuperscript{157} \textit{Id.} at 1187.
\textsuperscript{158} 523 A.2d 1118 (Pa. 1987).
\textsuperscript{159} \textit{Id.} at 1119.
the "land itself" causes the injury.\textsuperscript{160} The other major precedent that the court reviewed was \textit{Snyder v. Harmon}.\textsuperscript{161} In \textit{Snyder}, the court observed that it previously had held that the Act requires that the "dangerous condition must derive, originate from or have as its source the Commonwealth realty."\textsuperscript{162}

According to the supreme court, the common theme in these earlier cases is that "liability depends, first, on the legal determination that an injury was caused by a condition of government realty itself, deriving, originating from, or having the realty as its source, and, only then, the factual determination that the condition was dangerous."\textsuperscript{163} The court translated this test into a requirement of proof that there was a defect in the sidewalk itself, such as an improper design or construction, in order to meet the requirements for the "sidewalk exception" as set forth in the Act.\textsuperscript{164}

Applying this test to the \textit{Finn} case, it was clear to the majority that the plaintiff should not recover. The court noted that there was no allegation that a defect in the sidewalk contributed in any way to her injuries. The proof established only that someone had allowed grease to be present on the sidewalk, and it was this act, not the condition or defect of the sidewalk, which caused plaintiff's injuries.\textsuperscript{165}

Justices Cappy and Zappalla dissented. Justice Cappy asserted that the majority erred in focusing on a mere preposition in a statute to decide an important issue.\textsuperscript{166} He argued that the obvious meaning of the statute and the intent of the legislature is to provide for governmental liability where persons are injured

\textsuperscript{160} \textit{Id.} at 1124.
\textsuperscript{161} 562 A.2d 307 (Pa. 1989).
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} Justice Cappy observed as follows: "In reaching this conclusion, the Majority resorts to adoption of a hollow distinction—that the unsafe condition of the sidewalk herein was not 'of' the sidewalk, but simply 'on' the sidewalk, because the sidewalk was 'perfectly designed and constructed and undamaged.'" \textit{Id.} at 1347 (Cappy, J., dissenting) (quoting \textit{id.} at 1346).
using governmental property. As to the "sidewalk exception,"
he argued that, in the context of the general intent of the statute to
provide for governmental liability, it means that a municipality or
subdivision may be liable for the existence of a dangerous
condition. Furthermore, Justice Cappy argued that the
legislature provided the only limitations in the statute, which are
that the injury be reasonably foreseeable and that the municipality
have actual knowledge or reason to know of the condition.
Justice Cappy rejected the majority's reliance on the Snyder case,
arguing that the case was clearly distinguishable because the
property on which the injury occurred in Snyder was not owned by
the Commonwealth. The same was true of the Mascaro case,
another case on which the majority relied.

According to Justice Cappy, the true intent of the legislature
in enacting the "sidewalk exception" was to require municipalities
to "design, construct and maintain their sidewalks in a safe
condition." Because that is so, "[c]learly, the Legislature could
not have intended to hold the City to such a duty with regard to its
sidewalks without intending it to be liable for injuries resulting
from a breach of such duty." He observed that the majority
conceded that the municipality would be liable for a badly
maintained sidewalk. This liability arises, he reasoned, from the
negligence of the municipality in failing to maintain the

167 Justice Cappy criticized the majority as follows:
[The majority's] proposition is not supported by a plain reading of the
"sidewalks" exception, and the obvious intention of the Legislature to
generally retain governmental liability in situations involving injuries
suffered by individuals while using governmental real property,
including sidewalks, where the real property constitutes a dangerous
condition of which the political subdivision possesses actual or
constructive notice.

Id.

168 Id. at 1348 (Cappy, J., dissenting).
169 Id. at 1347 (Cappy, J., dissenting).
170 Id.
171 Id. at 1347-48 (Cappy, J., dissenting).
172 Id. at 1348 (Cappy, J., dissenting) (emphasis added).
173 Id.
Thus it is the action, or lack of action, attributable to the municipality that was the cause of the liability because it was the intent of the legislature that the focus of analysis be upon the action or inaction of the municipality. He argued that the majority approach mistakenly focused upon the sidewalk itself and that this error distracted from the real issue intended to be addressed by the legislature—the negligence of the municipality.

Therefore, just as the liability of the municipality for design and construction defects is based upon the negligence of the persons who acted for the municipality in those tasks, it is the negligence of the city in depositing grease, or failing to correct the dangerous condition which the grease created, that is at the heart of the issue in this case. Based on this analysis, there should be no difference between the outcome in this case, where there is an uncorrected dangerous condition of which the municipality had notice, and a negligent design or construction defect case. Justice Cappy forcefully pointed out that it is impossible to distinguish the factual situation of this case from the design and construction defect situations and that the majority failed to explain this distinction. This failure to explain and distinguish occurred, he argued, because the majority’s approach was illogical.

Justice Cappy also subjected the majority approach to a practical or pragmatic test. After describing his differences with the majority regarding the intent of the legislature, he questioned the direction toward which the majority approach to sovereign immunity cases like Finn will lead. Because of the asserted illogic and inattention to the behavioral implications of the majority opinion, he concluded that the majority’s holding will lead to

174 Id.
175 Id.
176 Id.
177 Id.
178 Justice Cappy concluded: "Given this, I cannot comprehend how the Majority can logically conclude that the negligence of the City in depositing the grease and/or in failing to correct the dangerous condition it knew about somehow compels a different result." Id.
unjust and anomalous results.\(^{179}\) Indeed, he found that the majority position had already led to unfortunate results. While the *Finn* case was pending, the commonwealth court decided the case of *McRae v. School District of Philadelphia*.\(^{180}\) In that case, the plaintiff fell on an accumulation of ice on a sidewalk adjacent to a Philadelphia school.\(^{181}\) Relying on the commonwealth court's decision in *Finn*, which was affirmed by the supreme court, both the trial court and the commonwealth court held for the defendant school district because the hills and ridges of ice did not "emanate" from the sidewalk and therefore could not fall within the "sidewalk exception."\(^ {182}\) According to Justice Cappy, the message that this "absurd" conclusion sends is that school districts no longer have to carefully maintain their sidewalks.\(^ {183}\)

Justice Zappala joined the dissent of Justice Cappy but wrote separately to emphasize the legislature's intent regarding the waiver of sovereign immunity. He referred to the report of the Joint State Government Commission Task Force on Sovereign Immunity.\(^ {184}\) The report, written in 1978, stated that in the area of waiver of sovereign immunity the intent was to impose the same liability on a municipality as would exist if the property were owned by a private person.\(^ {185}\) He concluded that the majority opinion was "strained, illogical, contrary to the intention of the General Assembly, and apt to foster absurd results."\(^ {186}\)

The majority opinion in *Finn* is not persuasive. The Statutory Construction Act of 1972\(^ {187}\) makes it clear that finding the intent of the legislature is the paramount concern in cases involving

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\(^{179}\) *Id.*


\(^{181}\) *Id.* at 209.

\(^{182}\) *Id.* at 210-11.

\(^{183}\) *Finn*, 664 A.2d at 1348 (Cappy, J., dissenting).

\(^{184}\) *Id.* at 1349 (Zappala, J., dissenting). The Joint State Government Commission is the research arm of the legislature.

\(^{185}\) *Id.*

\(^{186}\) *Id.*

statutory interpretation.\textsuperscript{188} Furthermore, other sections of the Statutory Construction Act make the findings of such bodies as the Legislative Reference Bureau persuasive, if not controlling, in ascertaining the intent of the legislature.\textsuperscript{189} Also, if possible, all portions or parts of a statute are to be given effect.\textsuperscript{190} Nevertheless, the majority made no attempt to find the true intent of the legislature, the report of the Joint State Government Commission was ignored, and the "sidewalk exception" was construed so narrowly that it ceased to exist for all practical intents and purposes. Arguably, a construction of the exception that is this narrow does not give effect to all parts of the statute.

As pointed out above, the majority reasoned that the Act creates immunity, and therefore any exceptions must be narrowly construed. This conclusion does not appear to involve an attempt by the court to ascertain the intent of the legislature. It does not logically follow that, because the legislature in the Act established sovereign immunity after the court had abrogated the doctrine in the \textit{Mayle} case, the legislature also meant, or only could have meant, the exceptions to the Act are to be construed as narrowly as possible. To the contrary, it is equally plausible that the legislature, in defining categories of real property municipal liability and the "sidewalk exception," intended those "exception" categories to be broadly construed or to be given their normal meaning, rather than the extremely narrow interpretation that the supreme court fashioned for those words.\textsuperscript{191} There is simply no support in the Act or in any other document to indicate that the

\textsuperscript{188} The applicable portion of the statute provides in pertinent part: "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 PA. CONS. STAT. § 1921(a).

\textsuperscript{189} As further guidance, The Statutory Construction Act provides that, "[w]hen the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters[,] . . . [l]egislative and administrative interpretations of such statute." \textit{Id.} § 1921(c)(8).

\textsuperscript{190} \textit{Id.} § 1921(a).

\textsuperscript{191} Section 1922 of the Statutory Construction Act lists certain presumptions that may be used in discerning the intent of the legislature. \textit{Id.} § 1922. One of these presumptions is "[t]hat the General Assembly intends the entire statute to be effective and certain." \textit{Id.} § 1922(2).
legislature intended the "sidewalk exception" to be narrowly construed. The logic of the majority opinion is as follows: the statute first reinstates sovereign immunity, then creates exceptions to that immunity; therefore, the exceptions must be narrowly construed. When reduced to this syllogistic form, the error in logic of the majority opinion becomes apparent. The majority asserts that, because there is an exception in a statute that establishes a defense, the exception must be construed in the narrowest terms imaginable. Neither logically nor linguistically does it follow that this was the intent of the legislature; for, after all, why did the legislature put the exceptions into the Act? Their inclusion in the Act implies their significance rather than legislative disapproval. In addition, if such an unnaturally narrow construction or meaning was intended, would not the legislature have expressly so stated? Viewed in this light, the majority interpretation of the exception appears arbitrary.

Thus the dissenting opinions are more persuasive. It is hoped that, as further cases demonstrating the unfortunate results caused by the principles adopted by the majority in *Finn* are appealed to the supreme court on this issue, the court will reconsider its position. If it does not, the legislature may well consider amending the Act.

**VI. Conclusion**

In the cases reviewed, although there have been some uneven positions, the Pennsylvania Supreme Court has generally decided cases that continue to develop administrative law effectively. The court has advanced the maturing of the scope-standard of review doctrine. It is necessary to pay particular attention to this area for several reasons. First, the doctrine in the administrative area is particularly difficult to apply if for no other reason than its applicability to a wide variety of areas governed by different statutes. These statutes express varying policies, which in turn may affect the scope or standard of review. This is precisely what occurred in the *Pennsylvania State Police* case, and the supreme court's guidance will be helpful to the lower courts in this area. Second, the concepts are ones that are difficult to apply generally. The supreme court's attempt to furnish guidance was sorely
needed, and it should be continued in the future.

In the due process area, development of the Lyness standards continues. Unfortunately, the court appears to continue to adhere to the right-privilege distinction in this area. It is hoped that the court will work to develop a new test for measuring those types of property and liberty interests that are protected by the Due Process Clause or else turn to a more modern test. Even conceding arguendo that the particular interest involved in the Marich case, a hunting license, may involve a minimal loss, the case is problematic because of its use of the outdated and outdated right-privilege test. The difficulties and injustices created by that test have been described and documented many times.192 It would be unfortunate to continue to use that test in view of the extensive literature that documents the dangers of injustice and unfairness that it created in the past. There is no reason to believe that the test will operate any more fairly now or in the future, and thus it should be abandoned.

In the area of separation of powers, the court continues to assert its independence. This is not a situation that should be wholly unexpected, given the fact that the 1968 Amendments to the Pennsylvania Constitution appear to furnish support for the proposition that there is a bright-line separation between the branches of government in Pennsylvania and, consequently, no blending of powers. The supreme court's actions are thus not merely expected, but natural. The court perceives its role, a role defined by the language of the Pennsylvania Constitution as amended, to be the sole manager and protector of the judiciary. As such, it has and will continue to defend any perceived incursion on the powers of the judiciary.

Finally, in the area of sovereign immunity, the Finn case appears to adopt an arbitrary, narrow interpretation of the sidewalk exception to sovereign immunity. The supreme court's position that this result is dictated by the intent of the legislature is not persuasive. Therefore, it is to be hoped that the court will reconsider its position.

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192 For a further critique of the right-privilege test, see supra notes 65-88 and accompanying text.