The Pennsylvania Judicial Engagement State Forum Supplemental Reading Material

Friday, October 16, 2020

Hosted by the Center for Judicial Engagement at the Institute for Justice and the Philadelphia Chapter of the Federalist Society

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Suggested Additional Reading

From Mark Aronchick:

- Pennsylvania Constitution, Art. I, § 5: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
- *League of Women Voters of Pennsylvania v. Commonwealth*, 645 Pa. 1, 135, 178 A.3d 737, 835 (Feb. 7, 2018) (Baer, J., concurring & dissenting); *id.* at 144, 831 (Saylor, C.J., dissenting); *id.* at 150, 834 (Mundy, J.).
- *League of Women Voters of Pennsylvania v. Commonwealth*, 645 Pa. 576, 181 A.3d 1083 (Feb. 19, 2018) (per curium opinion and dissents).
- *Penn. Democratic Party v. Boockvar*, 2020 Pa. LEXIS 4685, 2020 WL 5554644 (Sept. 17, 2020) (majority opinion and dissents).

From John Hare:

- Pennsylvania Constitution, Art. I, § 11: "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."
- *Dana Holding Corp. v. WCAB (Smuck)*, 232 A.3d 629 (Pa. 2020).
- Pennsylvania Constitution, Art. 3, § 3: "No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof."
- *DeWeese v. Cortes*, 588 Pa. 738, 906 A.2d 1193 (2006).
- *Commonwealth v. Neiman*, 624 Pa. 53, 84 A.3d 603 (2013).
- *Leach v. Commonwealth*, 636 Pa. 81, 141 A.3d 426 (2016).

From David Osborne:

- Pennsylvania Constitution, Article VIII.
- *Tosto v. Pa. Nursing Home Loan Agency*, 460 Pa. 1, 331 A.2d 198 (1974).
- *Giordano v. Ridge*, 737 A.2d 350 (Pa. Cmwlth. 1999), with dissenting opinion from Judge Doris A. Smith-Ribner.
- *Ramos v. Allentown Educ. Ass'n*, 2016 Pa. Commw. Unpubl. LEXIS 871 (Pa. Cmwlth. 2016).
- Nicholas J. Houpt, *Shopping for State Constitutions: Gift Clauses as Obstacles to State Encouragement of Carbon Sequestration*, 36 Colum. J. Envtl. L. 359 (2011).

[J-71-2019]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

SARA LADD, SAMANTHA HARRIS, AND POCONO MOUNTAIN VACATION PROPERTIES, LLC,	:	No. 33 MAP 2018
Appellants	:	Appeal from the Order of the Commonwealth Court at No. 321 MD 2017 dated June 4, 2018 sustaining in part and overruling in part the preliminary objections and dismissing with prejudice the Petition for Review.
v.	:	
	:	ARGUED: September 11, 2019
REAL ESTATE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA AND DEPARTMENT OF STATE (BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS) OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Appellees	:	

OPINION

JUSTICE DOUGHERTY **DECIDED: May 19, 2020**

We consider the Commonwealth Court's holding that the broker licensing requirements codified in the Real Estate Licensing and Registration Act, 63 P.S. §§455.101-455.902 (RELRA), satisfy the heightened rational basis test articulated in *Gambone v. Commonwealth*, 101 A.2d 634 (Pa. 1954), and thus do not violate Article I, Section 1 of the Pennsylvania Constitution when applied to a self-described "short-term

vacation property manager."[1] We conclude the Commonwealth Court erred in so holding, and therefore reverse and remand for further proceedings pursuant to this opinion.

I. Background

We begin by describing the relevant provisions of RELRA, which set forth the statutory licensing requirements for real estate brokers in Pennsylvania. Specifically, RELRA requires that any person engaged in the business of real estate, including those persons "acting in the capacity of a broker or salesperson," be "licensed or registered as provided in this act[.]" 63 P.S. §455.301. The statute defines a "broker" as:

> Any person who, for another and for a fee, commission or other valuable consideration:
>
> (1) negotiates with or aids any person in locating or obtaining for purchase, lease or an acquisition of interest in any real estate;
>
> (2) negotiates the listing, sale, purchase, exchange, lease, time share and similarly designated interests, financing or option for any real estate;
>
> (3) manages any real estate;
>
> (4) represents himself to be a real estate consultant, counsellor, agent or finder;
>
> (5) undertakes to promote the sale, exchange, purchase or rental of real estate: Provided, however, That this provision shall not include any person whose main business is that of advertising, promotion or public relations;
>
> (5.1) undertakes to perform a comparative market analysis; or
>
> (6) attempts to perform any of the above acts.

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[1] Article I, Section 1 of the Pennsylvania Constitution provides:

> All 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.

63 P.S. §455.201. RELRA expressly exempts from this statutory definition of "broker" certain individuals who engage in the activities described in Section 455.201 and are therefore not required to obtain a broker license before providing the listed services. Notably, the statute exempts, *inter alia*, "[a]ny person employed by an owner of real estate for the purpose of managing or maintaining multifamily residential property[.]" 63 P.S. §455.304(10).[2]

RELRA requires real estate "brokers" to take an examination before becoming "licensed" to engage in any of the above-described activities in Pennsylvania. To be eligible to sit for the "broker's license examination," an individual is required to: (1) be 21 years-old; (2) have a high school degree or its equivalent; (3) "have completed 240 hours in real estate instruction in areas of study prescribed by the rules of the commission, which [ ] shall require instruction in the areas of fair housing and professional ethics[;]"[3] and (4) "have been engaged as a licensed real estate salesperson for at least three years or possess educational or experience qualifications which the commission deems to be the equivalent thereof." 63 P.S. §455.511(1)-(4). A real estate "salesperson" is separately defined as:

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[2] Other exemptions include: owners of real estate with respect to their own property; employees of a public utility; employees of energy or mineral resource companies; attorneys pursuant to a power of attorney; a trustee; officer or director of a banking institution during certain transactions; cemetery companies; and auctioneers. 63 P.S. §455.304(1)-(11).

[3] The topics offered include: "Real Estate Law;" "Real Estate Finance;" "Real Estate Investment;" "Residential Property Management;" "Nonresidential Property Management;" "Real Estate Sales;" "Residential Construction;" "Valuation of Residential Property;" and "Valuation of Income-Producing Property." In addition, candidates for a broker's license are required to achieve credits from a "Commission-developed or approved real estate office management course;" and a "Commission developed or approved law course." 49 Pa. Code §35.271(b)(2)(i)-(ix).

> Any person employed by a licensed real estate broker to perform comparative market analyses or to list for sale, sell or offer for sale, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate or to negotiate a loan on real estate or to lease or rent or offer to lease, rent or place for rent any real estate or collect or offer or attempt to collect rent for the use of real estate for or in [sic] behalf of such real estate broker.

63 P.S. §455.201. In addition, before becoming a real estate "salesperson" one must sit for an examination after satisfying these additional requirements: (1) be at least 18 years-old; (2) "complete[ ] 75 hours in real estate instruction in areas of study prescribed by the rules of the commission, which [ ] shall require instruction in the areas of fair housing and professional ethics[;]"[4] and (3) have a high school degree or its equivalent. 63 P.S. §455.521(1)-(3). After passing the salesperson examination an individual must apply to the Real Estate Commission (Commission) for a license and "submit a sworn statement by the broker with whom [the salesperson] desires to be affiliated certifying that the broker will actively supervise and train the applicant." 63 P.S. §455.522(a)-(b).

Only upon completion of the requisite three years as a real estate salesperson, and assuming the other three criteria in Section 455.511 are satisfied, may an individual sit for the broker's license examination. *See* 63 P.S. §455.511(1)-(4). Upon passing the examination, the individual must submit an application to the Commission indicating his or her place of business, 63 P.S. §455.512(a)-(b), and the newly licensed broker must thereafter "maintain a fixed office within this Commonwealth." 63 P.S. §455.601(a). Failure to comply with these licensing requirements before performing the services of a "broker" results in a summary offense and upon conviction a "fine not exceeding $500 or [ ] imprisonment, not exceeding three months, or both[.]" 63 P.S. §455.303. Moreover, a person who commits any "subsequent offense shall be guilty of a felony of the third

[4] The topics offered include: "Real Estate Fundamentals," "Real Estate Practice" and all acceptable basic real estate courses offered by accredited institutions. 49 Pa. Code §35.272(b)(2).

degree and upon conviction [ ], shall be sentenced to pay a fine of not less than $2,000 but not more than $5,000 or to imprisonment for not less than one year but not more than two years, or both." *Id*. Finally, the Commission is authorized to "levy a civil penalty [ ] up to $1,000" for practicing real estate without a license. 63 P.S. §455.305.

We now turn to the facts of the present case. Appellant Sara Ladd, a New Jersey resident, owns two vacation properties on Arrowhead Lake in Monroe County, Pennsylvania, an area commonly known as the Pocono Mountains. Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief, 7/18/2017 at ¶¶15-18. Ladd started renting one of these properties in 2009 and the other in 2013 to supplement her income after being laid off from her job as a digital marketer. *Id*. at ¶¶17, 19. She used her digital marketing experience to establish an online system for booking the rentals. *Id*. at ¶20. Eventually, some of her Arrowhead Lake neighbors learned of her success and asked her to manage rental of their own properties. *Id*. at ¶21. By late 2013, Ladd formed a New Jersey limited liability company, Pocono Mountain Vacation Properties, LLC (PMVP), and in 2016, launched a corresponding website. *Id*. at ¶¶22-23. Her objective was to "take the hassle out of short-term vacation rentals by handling all of the marketing and logistics that property owners would otherwise have to coordinate themselves[.]" *Id*. at ¶25. Ladd considered "short-term" vacation rentals to be rentals for fewer than thirty days, and limited her services to such transactions only. *Id*. at ¶2 n.1.

Ladd acted as an "independent contractor" for her "clients" and entered into written agreements with them related to her services. *Id*. at ¶¶26-27. In these contracts, Ladd agreed to market her clients' properties on the internet;[5] respond to inquiries and coordinate bookings according to a list of pre-approved dates; manage all billing including

[5] In addition to marketing properties on her own PMVP website, Ladd also listed her clients' properties on Airbnb, HomeAway, Flip, Key, and VRBO. *Id*. at ¶27(b).

accepting rental payments and security deposits, subtracting her own commission, and remitting payments to her clients; and ensure the properties were cleaned between renters. *Id*. at ¶27. Her clients agreed to: execute a contract between themselves and the tenant; provide a list of available dates; work with Ladd to establish a rental rate; certify the property complied with all applicable laws; pay all applicable taxes;[6] maintain short-term rental liability insurance; provide a list of household rules and instructions; and ensure the property was stocked with necessary supplies and items in accordance with the website listing. *Id*. at ¶28. However, Ladd herself was never a party to the contracts between her clients and their renters. *Cf*. *id*. at ¶27.

Ladd managed PMVP alone and operated a majority of its business from her home in New Jersey. *Id*. at ¶40. According to Ladd, this limited overhead allowed her to provide low-cost services to her clients. *Id*. Her services involved rentals lasting only a few days at a time for just a few hundred dollars. *Id*. at ¶¶31-32. She never managed more than five clients' properties at one time and never managed a property outside of the Pocono Mountains. *Id*. at ¶33. She distinguishes her services from those of traditional real estate brokers who engage in "complex, months- or year-long transactions involving the transfer of permanent or long-term interests in real property" and generally "buy and sell houses worth tens or hundreds of thousands of dollars." *Id*. at ¶¶36-37. Ladd's services did not include buying or selling real property on behalf of her clients. *Id*. at ¶30.

In January 2017, the Commonwealth's Bureau of Occupational and Professional Affairs (the Bureau), charged with overseeing the Commission's enforcement of RELRA,

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[6] Beginning in 2015, Ladd advised her clients they were required to comply with the Commonwealth's "hotel tax." *Id*. at ¶34, *citing* 72 P.S. §7210(a) ("an excise tax of six per cent of the rent upon every occupancy of a room or rooms in a hotel in this Commonwealth, which tax shall be collected by the operator from the occupant") and 61 Pa. Code §38.3 (defining "hotel" as any form of lodging "available to the public for periods of time less than 30 days").

called Ladd to inform her she had been reported for the "unlicensed practice of real estate." *Id*. at ¶60. Ladd reviewed RELRA and concluded her short-term vacation property management services were covered by the statute, and she would have to obtain a real estate broker license to continue operating PMVP. *Id*. at ¶¶61-62. As Ladd was sixty-one years old and unwilling to meet RELRA's licensing requirements, she shuttered PMVP to avoid the civil and criminal sanctions described in the statute. *Id*. at ¶67; *see also* 63 P.S. §§455.303, 455.305.

Ladd filed a complaint in the Commonwealth Court's original jurisdiction, seeking declaratory judgment and a permanent injunction.[7] Specifically, Ladd alleged RELRA's broker requirements and the Bureau's practices violate her substantive due process rights pursuant to Article I, Section 1 of the Pennsylvania Constitution because they impose unlawful burdens on her right to pursue her chosen occupation. *Ladd v. Real Estate Comm'n of Commonwealth*, 187 A.3d 1070, 1074 (Pa. Cmwlth. 2018). The Commonwealth filed preliminary objections in the nature of a demurrer,[8] challenging the legal sufficiency of Ladd's Article I, Section 1 claim, arguing the matter was not yet ripe and that Ladd had failed to exhaust statutory remedies.[9] *Id*. In response, Ladd argued the matter was ripe for judicial review because if relief were denied she would be subject to substantial hardships. *Id*. at 1075. She also argued she was not required to exhaust her administrative remedies because she was subject to "direct and immediate" effects

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[7] Samantha Harris, one of Ladd's rental clients, and PMVP were also named plaintiffs in the lawsuit. Named defendants were the Commission and the Bureau (the Commonwealth).

[8] The Commonwealth defendants raised an additional preliminary objection claiming plaintiff Harris lacked standing. This objection was not decided by the Commonwealth Court and is not before us in this appeal.

[9] *See, e.g.*, *Arsenal Coal Co. v. Dep't. of Envtl. Res.*, 477 A.2d 1333, 1338 (Pa. 1984) (plaintiff challenging agency's enforcement of regulation is generally required to exhaust statutorily defined administrative remedies before seeking equitable relief in court).

of Bureau enforcement. *Id*., *citing Bayada Nurses, Inc. v. Dep't. of Labor & Industry*, 8 A.3d 866, 875-76 (Pa. 2010) (applying the exception announced in *Arsenal Coal Co. v. Dep't. of Envtl. Res.*, 477 A.2d 1333, 1339 (Pa. 1984) permitting pre-enforcement review when the effects of enforcement are sufficiently "direct and immediate") and *Pennsylvania Independent Oil & Gas Ass'n. v. Dep't. of Envtl. Protection*, 135 A.3d 1118, 1125-26 (Pa. Cmwlth. 2015) (same). Ladd further argued demurrer should be overruled because she was not required to prove the merits of her substantive due process claim at the pleadings stage and because RELRA, as applied to her, was unconstitutional pursuant to the heightened rational basis test applied in *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003) (applying heightened rational basis test announced in *Gambone*, as discussed *infra*). *Id*. at 1075-77.

The Commonwealth Court first considered whether the matter was ripe for judicial review, or whether Ladd was first required to exhaust administrative remedies, noting that the principles behind both defense objections are distinct but they are often considered together when a party seeks pre-enforcement judicial review. *Id*. at 1076. The court then determined both doctrines were satisfied and pre-enforcement review was warranted because the effect off RELRA's licensing requirements on Ladd were sufficiently "direct and immediate" as she faced substantial criminal and civil sanctions for noncompliance pursuant to Sections 455.303 and 455.305 and a lengthy administrative process if she continued her business operations. *Id*., *citing Arsenal Coal*, 477 A.2d at 1339. However, the court ultimately sustained the Commonwealth's demurrer and dismissed the complaint, holding RELRA's broker requirements are constitutional as applied to Ladd. *Id*. at 1078. In doing so, the panel applied the heightened rational basis test announced in *Gambone*.

The *Gambone* Court held a law restricting social and economic rights, like the right to pursue a lawful occupation, "must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." 101 A.2d at 637. Applying *Gambone's* heightened rational basis test to the present factual scenario, the panel below concluded RELRA's licensing scheme as applied to Ladd was not unconstitutional. *Ladd*, 187 A.3d at 1077. The panel determined the purpose of RELRA's licensing requirement is "'to protect buyers and sellers of real estate, the most expensive item many persons ever buy or sell, from abuse by persons engaged in the business.'" *Id*. at 1077-78, *quoting Kalins v. State Real Estate Comm'n*, 500 A.2d 200, 203 (Pa. Cmwlth. 1985). Next, the panel observed professional licensing schemes are generally accepted across many professions to ensure competency, regardless of the number of hours worked or the number of clients. *Id*. at 1078 ("We would no sooner obviate the requirement for a professional engaging in the practice of real estate to hold a license than we would obviate the licensure requirement for an attorney, physical therapist, or any other professional, merely because they have limited clients or only practice part of the year."). The panel rejected the premise that "a license requirement becomes unreasonable or oppressive" for individuals who provide professional services "in a limited fashion," because it would "effectively upend the legitimacy of any requirement by the Commonwealth for a professional license." *Id*. The panel thus concluded "RELRA bears a real and substantial relationship to the interest in protecting from abuse buyers and sellers of real estate and is similar to licensing requirements in other fields." *Id*. The panel recognized RELRA's requirements would likely be "unduly burdensome" to Ladd due to the "small volume of real estate practice she conducted[,]" but "[t]he Pennsylvania Constitution . . . does not

require the General Assembly to establish a tiered system for every profession that it regulates" to account for such disparities. *Id*.

The panel also distinguished *Nixon*, *supra*, where this Court struck down as unconstitutional a statute prohibiting the employment of certain formerly convicted individuals in elderly care facilities because the prohibition was based on length of employment rather than individual rehabilitation efforts and thus lacked a real and substantial relation to the stated purpose of protecting facility residents. *Id*. at 1078-79, *citing Nixon*, 839 A.2d at 289-90. The panel determined RELRA did not impose a *Nixon*-like blanket ban excluding certain individuals from working in real estate, but simply "requires a real estate broker's license prior to engaging in the practice of real estate." *Id.* at 1079.

Ladd filed a direct appeal to this Court and we granted oral argument to determine:

> [Whether] the Commonwealth Court fail[ed] to correctly apply the Pennsylvania rational-basis test, as set forth by this Court in *Gambone v. Commonwealth*, 101 A.2d 634, 636-37 (Pa. 1954), and its progeny, by[:]
>
> 1. Failing to hold an occupational-licensing scheme to the same "means-ends" review under Article I, Section 1 of the Pennsylvania Constitution that this Court has uniformly applied to all other restrictions on the right to pursue a chosen occupation?
>
> 2. Sustaining [the Commonwealth's] demurrer on the ground that, as applied to Appellant Ladd's vacation property management services, RELRA bore a "real and substantial relationship to the interest in protecting from abuse buyers and sellers of real estate," even though Appellant Ladd – who does not buy or sell real estate – credibly alleged that her services posed no such risk?
>
> 3. Sustaining [the Commonwealth's] demurrer without considering whether applying RELRA to Appellant Ladd's vacation property management services imposed burdens that were "unduly oppressive or patently beyond the necessities of the case[?]"

Appellant's Brief at 4. Our standard of review in this appeal from the Commonwealth Court's decision to sustain preliminary objections in the nature of a demurrer is *de novo*, and our scope of review is plenary. *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008), *citing Luke v. Cataldi*, 932 A.2d 45, 49 n.3 (Pa. 2007). We recognize a demurrer is a preliminary objection to the legal sufficiency of a pleading and raises questions of law; we must therefore "accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts." *Id.*; *see also Yocum v. Commonwealth, Pa. Gaming Control Bd*., 161 A.3d 228, 234 (Pa. 2017). A preliminary objection in the nature of a demurrer "should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted." *Id*.

II. Arguments

Ladd begins by observing occupational restrictions must satisfy the *Gambone* heightened rational basis test — rather than the less stringent federal test discussed in *Shoul v. Commonwealth, Dep't of Transportation, Bureau of Driver Licensing*, 173 A.3d 669 (Pa. 2017) — because Article I, Section 1 of the Pennsylvania Constitution provides greater protections for occupational freedom than the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Appellant's Brief at 21-22, *citing Shoul*, 173 A.3d at 677 (recognizing Pennsylvania Constitution scrutinizes an exercise of police power more closely than its federal counterpart). Ladd admits the Commonwealth may exercise its police power by imposing restrictions on the right to pursue an honest trade to "protect the public health, safety, and welfare[,]" *see id*. at 26, *citing Nixon*, 839 A.2d at 286, but argues the power is not unrestricted and must satisfy both prongs of the *Gambone* test. *Id*. at 28, *citing Nixon*, 839 A.2d at 289. According to Ladd, the most important difference between the *Gambone* test and the federal rational

basis test is "'the degree of deference [each] affords to legislative judgment.'" *Id*. at 28-29, *quoting Shoul*, 173 A.3d at 677. Under the federal test, a statute restricting an economic liberty, like the right to earn a living, is presumed constitutional and a plaintiff is required to rebut every conceivable basis, whether or not it is in the record, to support the law. *Id*. at 29. However, when this Court applies the *Gambone* test, the Commonwealth's stated reason for enacting a given statute must be supported in the record or an objecting plaintiff may provide evidence to rebut that alleged reason. *Id*. at 29-30, *citing Warren v. City of Phila.*, 127 A.2d 703, 705 (Pa. 1956) (plaintiff can rebut presumption of constitutionality by producing sufficient evidence) and *Commonwealth ex rel. Woodside v. Sun Ray Drug Co.*, 116 A.2d 833 (Pa. 1955) (statute intended to protect public from mere "possibility" of being deceived is not sufficient to overcome challenge to statute as being unconstitutional and invalid exercise of police power).

Ladd argues the Commonwealth Court did not apply *Gambone* in a meaningful way in her case because it generally concluded, without consideration of her services, that application of RELRA's broker requirements bear a real and substantial relationship to the purpose of "protect[ing] buyers and sellers of real estate, the most expensive item many persons ever buy, or sell, from abuse," and because the panel never discussed whether the burdens imposed on her were "unduly burdensome or patently beyond the necessities of the case." *Id*. at 31-32, *citing Ladd*, 187 A.3d at 1077-78 (case involves a "'mere' licensing requirement[ ] [and those] are common 'across many career fields'" and that to distinguish her services "'would effectively upend the legitimacy of any requirement by the Commonwealth . . . for a professional license'"). Further, Ladd faults the panel for failing to understand that her services are unique and wholly different from a traditional real estate broker. *Id*. at 33 & n.24, *citing Ladd*, 187 A.3d at 1078 (licensing requirement not unreasonable or oppressive for individuals who provide regulated services in a

"limited fashion"); *id*. at 13-16 (arguing definition of "broker" is rooted in practice of real estate at time RELRA was enacted, which involved buying, selling, and leasing properties in large and often more permanent transactions). Although this Court never applied *Gambone* to a case exactly like Ladd's, she argues it is possible for her challenge to an occupational licensing law to succeed because other jurisdictions have applied similar tests to deem such laws unconstitutional. *Id*. at 34-35 n.25, 36-37 n.27 & n.28 (collecting cases). She emphasizes she alleged sufficient facts to show RELRA failed both prongs of the *Gambone* test or, at the very least, to survive a demurrer because it is not "'free and clear from doubt'" that RELRA, as applied, satisfies both prongs. *Id*. at 38-39, *quoting Mazur*, 961 A.2d at 101.

Regarding *Gambone's* mandate the law bear a "'real and substantial relation'" to a legitimate policy objective, Ladd alleges the government's stated interest is to protect buyers and sellers of homes. *Id*. at 39, *quoting Gambone*, 101 A.2d at 637. Ladd specifically argues none of RELRA's three broker requirements — the apprenticeship, instructional hours, or physical office space — bear a real and substantial relation to her services as a short-term vacation property manager because she does not assist individuals in buying or selling homes.

Ladd argues the apprenticeship requirement contains no objective measure of progress toward competency in short-term vacation property management, but instead would require her to work in an industry that provides totally different services; Ladd notes other jurisdictions have struck down apprenticeship requirements on similar grounds. *Id*. at 42-43 & n.30 (collecting cases). Ladd further argues the instructional requirements mandating hundreds of hours of coursework and passing two exams on real-estate practice do not bear a real and substantial relation to her ability to provide safe and quality short-term vacation property management services. She avers the courses required by

RELRA are broadly stated real-estate topics with no clear relation to her unique services. *Id*. at 48; *see also id*. at 47 (arguing even federal case law applying less restrictive rational basis test, *e.g.*, *Cornwell v Hamilton*, 80 F.Supp.2d 1101 (S.D. Cal. 1999), determined laws were unconstitutional on this basis). Finally, Ladd argues the brick and mortar office requirement is an archaic concept that bears no relation to her online, home-based business. Ladd asserts requiring her to maintain physical office space in Pennsylvania would not enhance the Commonwealth's ability to regulate, *see id*. at 50-51 (noting other real estate professionals regulated by RELRA are not subject to the brick and mortar requirement), nor does it have any impact on the competency of the services she provided.

Regarding *Gambone*'s directive that a reviewing court determine whether a statutory requirement is "'unreasonable, unduly oppressive or patently beyond the necessities of the case,'" Ladd argues the Commonwealth Court failed even to consider whether RELRA's broker requirements outweighed the government's purported policy objective when applied to her services. *Id*. at 52-53, *quoting Gambone*, 101 A.2d at 637. Ladd claims that, assuming *arguendo* RELRA's broker requirements have a "real and substantial relation" to the legislative goal, they are nevertheless unreasonable and unduly oppressive because those requirements still disproportionally burden her ability to earn a living and there are less drastic means of regulation available. *Id*. at 53, *citing Mahony v. Twp. of Hampton*, 651 A.2d 525, 528 (Pa. 1994) (applying *Gambone* to condemn economic regulation where "less drastic and intrusive alternative[s]" are available). Ladd argues the apprenticeship requirement is unduly oppressive because it places her ability to work at the discretion of licensed brokers and forces her to be financially subordinate to them for three years while forgoing her own business, when there are other less restrictive alternatives available. Ladd emphasizes less restrictive

alternatives already exist within RELRA for builder-owner salespersons, 63 P.S. §455.551, rental listing referral agents, 63 P.S. §455.561, and timeshare salespersons, 63 P.S. §455.591, and those jobs are more closely analogous to her vacation property management services than a real estate broker's services. *Id.* at 56.[10]

Next, Ladd asserts RELRA's instructional requirements are unnecessary — requiring that she spend hundreds of hours learning irrelevant material — and oppressive — requiring her to forgo three years of income to complete. Ladd insists she does not help clients buy or sell property, facilitate leases, or handle large sums of money and taking courses on how to perform those functions is irrelevant to her competent performance of a wholly different service. *Id.* at 61-63, *citing United Interchange, Inc. v. Spellacy*, 136 A.2d 801, 805-06 (Conn. 1957) (unnecessarily burdensome to subject individuals, who merely solicited homeowners to advertise their properties for sale in periodical, to Connecticut's most onerous real estate broker requirements despite falling within statute's definition of real estate broker) and *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 90 (Tex. 2015) (striking down educational requirements for eyebrow threaders because requiring completion of 750 hours of study to obtain a

[10] Ladd argues RELRA's severity is highlighted by the fact that hotel and apartment complex managers and travel agents, who provide services very similar to her own, are not subject to any form of licensure, *see* 63 P.S. §455.304(10), and are subject only to the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL). Appellant's Brief at 58-60, *citing* 73 P.S. §201-3.

Edward Joseph Timmons, Ph.D, who submitted an *amicus* brief in support of Ladd, suggests that, instead of licensing, short-term vacation property managers should be subject to a registration requirement, which is a less restrictive method of regulation. Timmons' Brief at 24. Timmons opines subjecting short-term vacation property management services to RELRA's onerous broker licensing regime will have negative implications for consumers because operating costs will increase and be passed on to them. *Id*. at 9, 14-16. Timmons further explains this is especially true when licensing requirements are not carefully crafted to fit the specific service they purport to regulate. *Id*. at 12-13.

cosmetology license, where only 430 hours or 52% of the coursework was relevant to their profession, was "not just unreasonable or harsh, but [] so oppressive" that it violated the Texas Constitution).[11] Here too, Ladd argues, it would be oppressive to require her to spend three years, study hundreds of hours of unrelated materials, and forgo income to operate her limited business. Finally, Ladd argues the brick and mortar office requirement is unduly oppressive because it is analogous to imposing an excessive fee on her right to work, *id*. at 63-64, *citing Olan Mills, Inc. v. City of Sharon*, 92 A.2d 222, 224 (Pa. 1952) (transient business license fee was unusual and unjustifiable extra expense imposed by the city), and the UTPCPL is available as a less restrictive alternative.

The Commonwealth responds that RELRA is constitutional as applied to Ladd because the General Assembly's intent was to protect the public when they buy or sell real estate regardless of the volume of work engaged in by a broker. Appellee's Brief at 12. The Commonwealth emphasizes the right to pursue a chosen occupation is not a fundamental right. *Id*. at 13-14. The Commonwealth agrees the *Gambone* test is applicable here, but stresses the General Assembly's laws are presumed constitutional and it need not present evidence to sustain the law's constitutionality. *Id*. at 14-15, *citing Nixon*, 839 A.2d at 287 n.15.

The Commonwealth notes RELRA is designed to "'protect the public from abuse by those who are engaged in the business of trading real estate.'" *Id*. at 15, *quoting Meyer v. Gwynedd Development Group, Inc.*, 756 A.2d 67, 69 n.2 (Pa. Super. 2000). To that end, argues the Commonwealth, RELRA includes educational and apprenticeship

[11] Ashish Patel, the plaintiff in the Texas case, submitted an *amicus* brief on behalf of Ladd. Patel analogizes this case to his own and argues RELRA's broker requirements, as applied to Ladd, fail the *Gambone* test because the sheer number of hours and costs imposed on Ladd to obtain a broker's license are unreasonable and unduly oppressive. Patel Brief at 16-18.

requirements to ensure brokers are adequately trained to provide quality services. *Id*., *citing* 63 P.S. §§455.511, 455.521. The Commonwealth claims Ladd's personal burdens are irrelevant because these statutory requirements ensure the General Assembly's purpose of protecting the public is achieved regardless of the workload, age, or other unique burdens of a particular broker. *Id*. at 15-16. The Commonwealth asserts the lower court was correct when it concluded RELRA's broker requirements satisfied the *Gambone* test because accepting Ladd's argument that a licensing scheme becomes unreasonable or oppressive as applied to individuals who provide professional services in a limited fashion would effectively undermine the legitimacy of any professional licensing requirement. *Id*. at 16-17, *citing Ladd*, 187 A.3d at 1077-78.

The Commonwealth further argues the statutes involved in *Gambone* and *Nixon* were internally inconsistent and failed to further the General Assembly's respective purposes, in addition to creating an absolute prohibition on an individual's ability to engage in certain activities, whereas RELRA merely provides requirements for participation. *Id*. at 17-18, 20 n.11; *see, e.g*., *Gambone*, 101 A.2d at 637 (limiting the size of signs showing the price of gas would not prevent fraud and larger, more visible signs might actually better prevent fraud and deception); *Nixon*, 839 A.2d at 281-82, 289-90 (statute arbitrarily and improperly distinguished between convicted individuals who worked at a covered facility for more or less than one year). Here, the Commonwealth asserts if an exception is created for Ladd's services then RELRA will be subject to the same internal inconsistencies that plagued the invalid statutes in *Gambone* and *Nixon* because the public will be protected when purchasing, selling or renting some real estate, but not when renting vacation properties. *Id*. at 18-19.

The Commonwealth warns that if the General Assembly is not permitted to set the minimum standards for real estate brokers it will likewise not be able to protect the public

from incompetent professionals in other fields. *Id*. at 19. It argues an exception for Ladd will create new due process rights for individuals who practice medicine without attending medical school, but intend not to perform major surgery, or architects who only design small houses, or pharmacists who only work weekends and do not prescribe narcotics. *Id*. The Commonwealth urges affirmance of the panel's decision because Ladd has not shown her due process rights were violated and the licensing requirements of RELRA are rationally related to the General Assembly's purpose of protecting the public. *Id*.

In a reply brief, Ladd argues the Commonwealth misconstrues the *Gambone* test as requiring only that a statute be internally consistent, when neither *Gambone* nor *Nixon* discussed consistency. Appellant's Reply Brief at 8. Ladd nevertheless asserts RELRA is internally inconsistent because certain individuals are totally exempt from its requirements, *see id*., *citing* 63 P.S. §455.304(10) (multi-family dwelling manager), while others are eligible for licensure without completing the full panoply of RELRA's most onerous requirements. *Id.*, *citing* 63 P.S. §§455.551 (builder-owner salesperson), 455.561 (rental listing referral agent), 455.591 (time-share salesperson). Next, Ladd rejects the idea that application of the *Gambone* test here will diminish the legislature's ability to enact future regulations on other professions. *Id*. at 9. Ladd suggests the Commonwealth's position is based on the flawed premise that the right to earn a living is in direct conflict with the preservation of the Commonwealth's police power, but she notes the right to earn a living does not include the freedom to injure or defraud others, and that is when the police power should be exercised. *Id*. at 11, *citing Nixon*, 839 A.2d at 286. Ladd also stresses subjecting a licensing requirement to *Gambone* is not a guarantee that it will fail; to the contrary, she observes most existing licensing laws would satisfy the *Gambone* test, as they are properly related to public health, safety or welfare, unlike RELRA's requirements in this case. *Id*. at 11-13. Finally, Ladd emphasizes the

Commonwealth Court erroneously required her to prove her entire case at the pleadings stage, when *Nixon* and *Sun Ray Drug Co.* support further fact-finding related to the *Gambone* test. *Id*. at 23-24.[12]

III. Analysis

Article I, Section 1 of the Pennsylvania Constitution provides "[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. Our case law explains that, included within the right to possess property and pursue happiness, is the right to pursue a chosen occupation.[13] *See Nixon*, 839 A.2d at 288, *citing Adler v. Montefiore Hosp. Ass'n of Western Pa.*, 311 A.2d 634, 640-41 (Pa. 1973) and *Gambone*, 101 A.2d at 636-37. However, unlike the rights to privacy, marry, or procreate, the right to choose a particular occupation, although "undeniably important," is not fundamental. *Nixon*, 839 A.2d at 287. The right is not absolute and its exercise remains subject to the General Assembly's police powers, which it may exercise to preserve the public health, safety, and welfare. *Gambone*, 101 A.2d at 636. But, the General Assembly's police powers are also limited and subject to judicial review. *Id.*

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[12] The Goldwater Institute, a nonpartisan public policy foundation, submitted an *amicus* brief on behalf of Ladd, taking the position *Gambone* applies and the Commonwealth Court erred because it effectively required Ladd to prove her constitutional claim on the merits at the pleadings stage. Goldwater Brief at 5-12.

[13] The Commonwealth argues because Ladd never had a real estate broker license it is not clear she ever had a property interest to support her present claim. Appellee's Brief at 13-14 n.9, *citing Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 946 (Pa. 2004) ("after a license to practice a particular profession has been acquired, the licensed professional has a protected property right in the practice of that profession") (citation omitted). However, this Court has long recognized a right to pursue a lawful occupation and never held that right was dependent on licensure. *See Nixon*, 839 A.2d at 288, *citing Adler*, 311 A.2d at 640-41 and *Gambone*, 101 A.2d at 636-37.

A claim, like Ladd's, that a Pennsylvania statute violates substantive due process is subject to a "means-end review" where the court "weigh[s] the rights infringed upon by the law against the interest sought to be achieved by it, and also scrutinize[s] the relationship between the law (the means) and that interest (the end)." *Nixon*, 839 A.2d at 286-87, *citing Adler*, 311 A.2d at 640-41. The level of scrutiny we apply to that means-end review is dependent upon the nature of the right allegedly infringed. When that right is fundamental, we apply strict scrutiny and will uphold the law only if it is narrowly tailored to achieve a compelling state interest. *Id*. at 287. A right that is not fundamental, however, is subject to rational basis review. *Id*. The rational basis test under Pennsylvania law is less deferential to the legislature than its federal counterpart. *Shoul*, 173 A.3d at 677.[14]

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[14] The United States Supreme Court has explained the deferential nature of the federal rational basis test in the context of a challenge based on the Fourteenth Amendment's Equal Protection Clause:

> We many times have said . . . that rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices . . . [A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,

Pennsylvania's less deferential, "more restrictive" test,[15] provides:

> [A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts.

Id., *quoting Gambone*, 101 A.2d at 636-37 (citation and footnotes omitted) and *citing Nixon*, 839 A.2d at 287 n.15 (recognizing "more restrictive" test). At this stage, we review the record to determine whether, accepting all well-plead facts as true, Ladd "clearly and without a doubt fail[ed] to state a claim for which relief may be granted." *Yocum*, 161 A.3d at 234. We accept as true Ladd's allegation that she is a short-term property manager where "short-term" is defined as a period less than thirty days. *See* Complaint at ¶2 n.1. Those services, as she defines them, *see id.* at ¶¶10-11, clearly fall within RELRA's

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> whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.

Shoul, 173 A.3d at 677, *quoting Heller v. Doe*, 509 U.S. 312, 319-21 (citations and quotations omitted).

[15] Notwithstanding Justice Wecht's dissenting position that *Gambone* is not good law and should be overruled, *see* Dissenting Opinion, Wecht, J., slip op. at 1-8, both parties to this appeal agree the rational basis test articulated in *Gambone* and applied in *Nixon* and *Shoul* is the proper test in a substantive due process challenge to a statute that purportedly infringes on a non-fundamental right.

definition of real estate broker. *See* 63 P.S. §455.201 (defining a broker as any person who "manages any real estate" and any person who "undertakes to promote . . . rental of real estate").

Accordingly, we must determine: (1) whether RELRA's real estate broker licensing requirements — apprenticeship, instructional coursework and examinations, and brick and mortar location — are "'unreasonable, unduly oppressive, or patently beyond the necessities of the case[;]'" and (2) whether those requirements bear a "'real and substantial relation'" to the public interest they seek to advance when applied to Ladd under the circumstances alleged in her complaint. *Nixon*, 839 A.2d at 287, *quoting Gambone*, 101 A.2d at 637. We also recognize there is a strong presumption the statutory scheme is constitutional; the presumption may be rebutted only by proof the law clearly, palpably, and plainly violates the constitution. *Shoul*, 173 A.3d at 678, *citing Nixon*, 839 A.2d at 285-86. Our review reveals Ladd's complaint was sufficient to survive a demurrer and she alleged sufficient undisputed facts to raise a colorable claim that RELRA's broker licensing requirements are unconstitutional as applied to her.

Preliminarily, we reject the attempt by the panel below to limit *Gambone* and *Nixon* to legislation that acts as a "blanket ban" or "an absolute bar" on conduct; the panel erroneously distinguished the present case from those earlier decisions on the grounds RELRA does not completely prohibit certain conduct. *See Ladd*, 187 A.3d at 1079 ("Rather than a blanket ban on certain individuals from working as real estate brokers, RELRA merely requires a real estate broker's license prior to engaging in the practice of real estate."). It is true these earlier cases involved statutory prohibitions. *See Gambone*, 101 A.2d at 636 ("No sign or placard showing the price of liquid fuels sold or offered for sale or relating to price or prices, other than the signs or placards thus provided for, shall be posted or displayed on the premises . . . unless the signs . . . [are] similar . . . to the

sign . . . posted on the pump."); *Nixon*, 839 A.2d at 281 (prohibiting all individuals convicted of enumerated crimes from working at a covered facility if they did not work at that facility for one year prior). However, this particular factual detail is not dispositive as *Gambone* and its progeny nevertheless stand for the proposition that the General Assembly, when exercising its police powers to curtail a non-fundamental right, will be subject to a heightened rational basis review. *See Nixon*, 839 A.2d at 287-88 (recognizing the *Gambone* test is the appropriate test when a law restricts "undeniably important" rights); *Shoul*, 173 A.3d at 676-77 (same).

Applying *Gambone* here, we first consider the purpose behind RELRA's broker licensing requirements. The Commonwealth Court has held and Ladd argues the purpose of RELRA is "to protect buyers and sellers of real estate, the most expensive item many persons ever buy or sell, from abuse by persons engaged in the business." *Kalins*, 500 A.2d at 203. However, the Commonwealth argues the statute is more broadly intended to protect the public from fraudulent practices by those "'engaged in the business of trading real estate.'" Appellee's Brief at 15, *quoting Meyer*, 756 A.2d at 69 n.2. The General Assembly did not articulate a specific purpose for RELRA within its provisions; accordingly, we consider the origins of Pennsylvania law mandating licensure of real estate brokers to glean some insight. We conclude the Commonwealth correctly asserts RELRA was enacted to protect the public from fraud by those "engaged in the business of trading real estate." *Meyer*, 756 A.2d at 69 n.2.

We begin by observing RELRA's predecessor, The Real Estate Brokers' License Act of 1929, "comprehensive[ly] regulat[ed] [ ] the business of selling real estate for others" and defined "real estate broker" as including "all persons who, for another and for a fee. . . rent, or . . . negotiate the…rental" of real estate. *Verona v. Schenley Farms Co.*, 167 A. 317, 318-19 (Pa. 1933). The *Verona* Court determined the "obvious purpose of

the Act of 1929 [was] to prevent fraud and public wrong by correcting well recognized mischief" that existed at the time, including: "[c]ollecting rents without accounting for them; embezzling of down money; deceiving principal as to the identity of [the] buyer; acting as agent for both buyer and seller; [and] misrepresentation by salesm[e]n as to [the] rental of property[.]" *Id*. at 319-20 & n.1. It is thus clear the Act of 1929 was intended to regulate the practice of real estate as it existed during that time which consisted of both leasing and sales. RELRA built on that foundation and also expressly requires that individuals engaged in sales or rentals be licensed brokers. *See* 63 P.S. §455.201 (1), (2), (5) (including individuals engaged in leasing within the definition of "real estate broker"). The plain language of Section 455.201 (defining real estate broker) indicates the General Assembly intended RELRA to apply broadly, not just to buying and selling, but to all real estate transactions as they existed at the time of enactment. *See generally Allstate Life Ins. Co. v. Commonwealth*, 52 A.3d 1077, 1080 (Pa. 2012) (best indication of legislative intent is plain language of statute). And, as we have noted, Ladd herself concedes that her business operations fell within the RELRA definition of real estate broker. *See* Appellant's Brief at 9 ("Ms. Ladd was shocked that RELRA swept her novel services into the same category as traditional real-estate practice."). Thus, we conduct our *Gambone* analysis in light of the apparent legislative goal of protecting the public from the fraudulent conduct of those "engaged in the business of trading real estate." *Meyer*, 756 A.2d at 69 n.2.

As a preliminary matter, we recognize the government's legitimate interest in protecting consumers from fraudulent conduct by those "engaged in the business of trading real estate." *Id*. Whether the legislative goal is licensing individuals who assist with buying, selling or leasing properties, the Commonwealth clearly has a "strong interest" in regulating professions within its borders and the legislature has "broad

power[s]" to establish the standards that will achieve that end. *Khan v. State Bd. of Auctioneer Exam'rs*, 842 A.2d 936, 947 (Pa. 2004). Here, the General Assembly identified a bundle of services to describe the activities of a "broker" and imposed a series of requirements — apprenticeship, instructional coursework and examinations, and brick and mortar location — ostensibly designed to ensure individuals providing those services would not defraud the public. *See id*. at 948 ("[a] state may impose those professional requirements that it believes necessary to protect its citizenry"). The present appeal implicates Ladd's as-applied challenge rather than the proposition that the RELRA licensing scheme is properly aimed at a legitimate government purpose. *See Ladd*, 187 A.3d at 1078 (recognizing RELRA's requirements generally bear a real and substantial relation to the government's objective and are similar to requirements in other fields).

Accordingly, even if RELRA's broker licensing requirements generally bear a real and substantial relationship to protecting the public from the fraudulent practices of those "engaged in the business of trading of real estate," *Meyer*, 756 A.2d at 69 n.2, we must now proceed to consider their specific application to Ladd's actual business model: short-term vacation property management services. As we explain below, we conclude the Commonwealth Court erred when it sustained the Commonwealth's demurrer; Ladd's complaint raises a colorable claim that RELRA's requirements are unconstitutional as applied to her because they are, in that context, unreasonable, unduly oppressive and patently beyond the necessities of the case, *Gambone*, 101 A.2d at 637, thus outweighing the government's legitimate policy objective.

The issue is one of first impression for this Court, but decisions from other jurisdictions that have conducted a *Gambone*-like analysis in the context of occupational licensing requirements are instructive. In *Patel, supra*, the Texas Supreme Court struck down a statute that required eyebrow threaders to obtain a cosmetology license because

it violated the Due Course of Law provision of the Texas Constitution.[16] 469 S.W.3d at 90. The court applied a rational basis test similar to that set forth in *Gambone* to determine the regulation was unconstitutional as applied to these individuals, who perform a very specific, limited cosmetology service. *Id*. at 87 (requiring the court to determine "whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying government interest"). In doing so, the court considered how much of the total 750 hours of coursework, including practical training, required for cosmetology licensure was completely unrelated to the specific service of eyebrow threading and determined the licensing requirement imposed a significant cost that was an unduly burdensome means to achieve the government's health and sanitation end. *Id*. at 89-90.

The parties in *Patel* agreed that at least 320 hours or 42% of the coursework was unrelated to threading, and the court's analysis focused on the "quantitative aspect of the [instruction] hours represented by the percentage and the costs associated with them[.]" *Id*. at 89-90. The court determined the number of unrelated hours, though less than fifty percent of the total coursework required, was "highly relevant" to its analysis because of the significant quantity of time and cost associated with completing them. *Id*. at 90. Specifically, the court held the statute was "not just unreasonable or harsh, but it [was] so oppressive," and thus unconstitutional, because so much study time was not relevant while requiring expenditures of money as well as forgone employment. *Id*.; *see also Cornwell,* 80 F.Supp.2d at 1110-1111, 1113 (applying less restrictive federal rational basis test to conclude cosmetology statute was not rationally related to government's

[16] *See* TEX. CONST. art I, §19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.").

health and sanitation ends as applied to hair braider where "well below ten percent" of training hours were related to hair braiding).

Ladd is similarly faced with 315 hours of coursework (75 hours for her salesperson license and 240 for her broker license) in various topical areas that pertain to the work of traditional real estate brokers, but not to the services contemplated by her unique business model. *See supra* at nn.2-3. The only topics listed that are arguably related to her services are the general two-credit "Commission-developed or approved law course" and maximum four-credit "Real Estate Law" and "Residential Property Management" courses which satisfy at most 150 hours of the 315 hour requirement. *See* 49 Pa. Code §§35.271(2)(i), (iv), (4) (listing course topics and setting maximum of 4 credits per course); 35.201 (defining one "credit" as 15 hours of instruction). In other words, RELRA requires Ladd to complete 165 hours of coursework geared toward educating individuals about large scale transactions including buying, selling, and leasing residential and commercial real estate. Further, because the **broker** coursework cannot be completed until the **salesperson** coursework and apprenticeship are satisfied, Ladd's burden is substantially increased because she would have to forego her own PMVP profits for three years while she completes the licensure requirements. Applying this metric to the allegations of Ladd's complaint, taken as true, we conclude she has asserted a colorable claim that RELRA's instructional requirements, as applied to her, are an unreasonable and unduly oppressive means to achieve the statutory objective of protecting consumers from the fraudulent practices of those "engaged in the business of trading real estate." *Meyer*, 756 A.2d at 69 n.2.

Notably, the *Patel* court had before it coursework alone when it determined the statutory licensure requirements were unduly oppressive. *See also Cornwell*, 80 F.Supp. 2d at 1111 (statute irrational and unreasonable because so much of cosmetology

curriculum was not relevant to hair braiders). Here, RELRA imposes an apprenticeship and a brick and mortar office requirement in addition to an instructional coursework requirement, which obviously increases the economic burden.[17] Considering both the quantity of non-relevant hours and the cost of completing those hours, *see, e.g.*, *Patel,* 469 S.W.3d at 89, the three-year apprenticeship requirement would impose a substantial cost on Ladd; during that time she would ostensibly learn the traditional real estate trade, *e.g.*, completing transactions involving thousands, if not hundreds of thousands of dollars to buy, sell, or lease properties. But, this practical knowledge would be neither relevant nor directly applicable to a short-term vacation property management business involving rentals that last only a few days and cost only a few hundred dollars. *See* Complaint at ¶¶ 31-32. Adding to the equation the lost opportunity cost of shuttering PMVP during the apprenticeship, we conclude Ladd has stated a claim that the broker license requirements are unreasonable, unduly oppressive and patently beyond the necessities of the case. *Gambone*, 101 A.2d at 637.

Similarly, we conclude the brick and mortar office requirement, as applied to Ladd's self-described business model, appears to be disproportionate to the government's interest in safeguarding the public from fraudulent practices by those who "trad[e] in real estate." *Meyer*, 756 A.2d at 69 n.2. According to Ladd, she performed her professional services solely online from her home in New Jersey, *see* Complaint at ¶24, and a requirement that she obtain physical office space in Pennsylvania is tantamount to an excessive fee for entry into a profession. *See, e.g.*, *Olan Mills,* 92 A.2d at 223-24 ($200 license fee for transient businesses was "out of all reason too high" and unnecessary to

[17] Although the coursework requirements in *Patel* and *Cornwell* included both educational and practical components, while RELRA separates educational training, designated as instructional hours — from practical training — designated as an apprenticeship — the distinction makes no difference because the apprenticeship serves to teach the practical techniques of the trade.

protect the city from "unreliable fly-by-night operators"). The allegations of Ladd's complaint — taken as true — indicate her business model is sustainable only because she can provide quality services with limited overhead, *see* Complaint at ¶40, and requiring additional overhead, including rental or mortgage, taxes, insurance, and maintenance of a property does not further the statutory objectives of RELRA.[18]

[18] As the parties have not challenged the viability of the heightened rational basis test, Justice Wecht focuses on advocating for its application in an essentially toothless manner. *See* Dissenting Opinion, Wecht, J., slip op. at 11-14 (dismissing the importance of considering Ladd's self-described business model and the potential costs imposed on her when applying *Gambone*). However, in this as applied constitutional challenge, which is still at the preliminary objection stage, we must accept well-pleaded facts as true – specifically, we accept Ladd's description of how she conducts her business as a short-term vacation property manager. *See, e.g*, Complaint at ¶40 (alleging her business is sustainable only due to her limited overhead). The issue before us is whether the General Assembly exercised its police powers in an unconstitutional manner. *See Gambone*, 101 A.2d at 637 ("The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for **the courts**.") (emphasis added). Our analysis of this question would be incomplete without consideration of the opportunity and financial costs imposed on short-term vacation property managers by RELRA's coursework, apprenticeship, and brick and mortar requirements. *See, e.g.*, *Cornwell*, 80 F.Supp.2d at 1106 n.16 (applying the federal rational basis test; considering the economic and opportunity costs imposed on natural hair braiders by requiring them to obtain a cosmetology license and stating "if would-be braiders spend scarce money and time to get a cosmetology license, that individual may have few or no resources remaining to devote to the pursuit of his or her own craft"); *Patel*, 469 S.W.3d at 89-90 (applying *Gambone*-like test and considering costs imposed by excessive, unrelated coursework). Here, Ladd raises a colorable claim that the costs imposed on her when her short-term vacation property management services are swept into the definition of a traditional real estate broker render RELRA unconstitutional because those costs outweigh the Commonwealth's articulated anti-fraud objective. *See Nixon*, 839 A.2d at 286-87 (substantive due process challenge is subject to "means-end review" where the court "weigh[s] the rights infringed upon by the law against the interest sought to be achieved by it, and also scrutinize[s] the relationship between the law (the means) and that interest (the end)"); *see also Gambone*, 101 A.2d at 637 ("Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.").

We find *Spellacy*, *supra*, to be persuasive. The Connecticut Supreme Court there considered the constitutionality of a statute regulating real estate brokers similar to RELRA. 136 A.2d at 803. The statute defined a "broker" as a person who "engag[es] in the real estate business," including listing for a fee the "sale, selling, exchanging, buying or renting [of] . . . real estate." *Id*. at 803. As a result, the *Spellacy* defendants, who did not engage in buying, selling, or leasing property, but simply solicited property owners to advertise in their periodical, were considered "brokers" operating without a license. *Id*. at 802. The court concluded the statutory requirements for broker licensure — a written examination, furnishing a corporate surety bond, and payment of substantial fees — were unconstitutionally burdensome as applied to the advertisers. *Id*. at 806. Obviously, *Spellacy* is not directly on point here because the advertiser defendants did not earn their fees by managing properties like Ladd. Nonetheless, the court's rationale that a real estate broker licensing scheme's most onerous requirements are unconstitutional when applied to individuals who do not provide traditional broker services is useful and relevant to our analysis.

We are further persuaded that it appears application of RELRA to Ladd is unconstitutional when we consider the fact that individuals who manage and facilitate rentals of lodging in apartment complexes and duplexes on behalf of their owners are completely exempt from the statute's broker licensing requirements, *see* 63 P.S. §455.304(10) (exempting "[a]ny person employed by an owner of real estate for the purpose of managing or maintaining multifamily residential property"), and those who manage and facilitate rentals in hotels do not fall under the terms of RELRA at all. It is clear Ladd's business model — as described in her complaint — is more closely analogous to the services provided by these exempt individuals than to those of a broker, despite the fact that the statutory definition of "broker" technically catches Ladd in its net.

Notably, Ladd routinely advised her clients they must comply with the Commonwealth's "hotel tax," 72 P.S. §7210(a) ("an excise tax of six per cent of the rent upon every occupancy of a room or rooms in a hotel"), where "hotel" is defined as any form of lodging "available to the public for periods of time less than 30 days." 61 Pa. Code §38.3. Ladd's "short-term vacation rental" clients were subject to the hotel tax because their contracts involved "transient" uses of property only. *See Slice of Life, LLC v. Hamilton Twnshp. Zoning Hearing Board*, 207 A.3d 886, 903 (Pa. 2019) (property made available for rent via home-sharing websites like Airbnb, "for a minimum of two nights and up to one week at a time" was used for "purely transient" purposes). Under the circumstances, Ladd asserts a colorable argument that it is unreasonable, unduly oppressive and patently beyond the necessities of the case, *Gambone*, 101 A.2d at 637, to exempt professions so closely analogous to her own while mandating her compliance with RELRA's onerous broker license requirements.

Indeed, it is these exemptions that remove from Ladd's challenge the specter raised by the Commonwealth, that is, a ruling in Ladd's favor will undermine all professional licensing schemes and subject them to challenges from individuals seeking tiered licensing regimes to practice their trade part-time or in limited subject areas.[19] *See*

[19] Justice Wecht believes we are creating a constitutional right to "a custom-made licensing statute" and proposes our holding is analogous to concluding "requirements for dentists are unconstitutional as applied to practitioners who only intend to extract teeth." Dissenting Opinion, Wecht, J., slip op. at 11-12. Respectfully, this tortured analogy misses the mark for two reasons. First, we do not hold an individual who engages in a profession, albeit in a limited fashion, cannot be subject to the broader regulatory scheme governing that profession. Instead, we conclude Ladd presents a colorable claim that as a short-term vacation property manager she is not engaged in the business of a real-estate broker because she provides different services – something like the distinction between a dental hygienist and dentist. And, contrary to Justice Mundy's reading, we do not view Ladd as a "limited fashion" real estate broker with a "smaller-scale business." Dissenting Opinion, Mundy, J., slip op. at 1. Second, and importantly, RELRA already excludes other "limited" broker-like professions – similar to Ladd's business model – from

supra at 18. In contrast to those hypothetical challenges, Ladd raises a colorable claim that RELRA's most onerous requirements are unreasonable, unduly oppressive, and patently beyond the necessities of her case, *Gambone*, 101 A.2d at 637, because there are clearly "less drastic and intrusive alternative[s]" already built into the licensing scheme. *Mahony*, 651 A.2d at 528.

Moreover, it is clear Ladd's business, as described in her complaint, would not operate without regulation and oversight in the absence of a broker license. *See e.g.*, *Spellacy*, 136 A.2d at 806 ("This is not to imply that [real-estate] activities such as the plaintiffs carry on cannot, consistently with constitutional limitations, be regulated."). Indeed, it appears her services would clearly fall under Pennsylvania's UTPCPL, as do the services of the RELRA-exempt hotel and apartment complex managers. *See* 73 P.S. §201-3 (prohibiting "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"). There is, therefore, a less drastic alternative to RELRA broker licensing that is not "unreasonable, unduly oppressive, or patently beyond the necessities of the case."[20] *Gambone*, 101 A.2d at 637; *see also Mahony*, 651 A.2d at 527-28 (concluding a zoning ordinance failed the *Gambone* test because "less drastic and intrusive alternatives" existed); *cf.* Timmons Brief at 12-13 (suggesting short-term vacation property managers should be subject to less restrictive registration requirement).

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its onerous broker requirements, and thus, she asserts a colorable claim that pursuant to *Gambone* it is unreasonable to include her within them.

[20] The UTPCPL is an existing mechanism that regulates those who facilitate rentals in apartment complexes, duplexes, and hotels – services analogous to Ladd's short-term vacation property management services. When viewed in that light, at this stage of the proceedings, Ladd's claim that it is an unconstitutional exercise of the Commonwealth's police powers to subject her to RELRA's most onerous broker requirements while subjecting these other services to less intrusive alternatives has considerable force.

Finally, we reiterate that the Commonwealth's police power must be exercised in a constitutional manner, one that is not unreasonable, unduly oppressive, or patently beyond the necessities of the case, and bears a real and substantial relation to the purported policy objective. *Gambone*, 101 A.2d at 637. We conclude Ladd's allegations present a colorable claim that RELRA's requirements, as applied to her self-described services, are unreasonable, unduly oppressive and patently beyond the necessities of the case, and it is not clear and "without a doubt" those requirements bear a real and substantial relation to the statutory goal of protecting the public from fraud. *See Yocum*, 161 A.3d at 234 (demurrer "should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted"). Accordingly, we reverse the Commonwealth Court's order dismissing Ladd's complaint and remand for further proceedings consistent with this opinion.

Chief Justice Saylor, and Justice Baer, Todd and Donohue join the opinion.

Justice Wecht files a dissenting opinion.

Justice Mundy files a dissenting opinion.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Courtney Haveman and Amanda Spillane, Petitioners	:	
v.	:	
Bureau of Professional and Occupational Affairs, State Board of Cosmetology of the Commonwealth of Pennsylvania, Respondent	:	No. 765 M.D. 2018 Argued: June 11, 2020

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge

OPINION BY
JUDGE COVEY

FILED: August 25, 2020

Before this Court is the Application for Summary Relief (Application) filed by Courtney Haveman (Haveman) and Amanda Spillane (Spillane) (collectively, Petitioners) filed in this Court's original jurisdiction. After review, we grant the Application.

Background

Petitioners are Pennsylvania residents who applied for limited cosmetology licenses from the Bureau of Professional and Occupational Affairs, State Board of Cosmetology (Board), to become licensed estheticians.[1] Although

[1] Section 1 of the Act of May 3, 1933, P.L. 242, commonly referred to as the Beauty Culture Law (Law), defines "esthetician" as "an individual licensed by the [Board] to practice esthetics." 63 P.S. § 507. "Esthetics" is defined therein as "the practice of massaging the face, applying

Haveman and Spillane met all of the other requirements, the Board denied their applications to sit for the esthetician examination and receive a license because they did not demonstrate good moral character as required by Section 5(a) of what is commonly referred to as the Beauty Culture Law (Law),[2] 63 P.S. § 511(a).[3]

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cosmetic preparations, antiseptics, tonics, lotions or creams to the face, removing superfluous hair by tweezers, depilatories or waxes and the dyeing of eyelashes and eyebrows." *Id.*

Section 5(b) of the Law offers limited licenses for estheticians, nail technicians and natural hair braiders. Regarding esthetician licenses, Section 5(b)(1) of the Law states:

> An applicant for an esthetician license shall have completed three hundred hours of instruction in esthetics in a licensed school of cosmetology and passed an examination limited to that practice. Licensed estheticians may operate a salon limited to that license. An applicant may be permitted to apply to take a written examination upon completion of at least two hundred fifty hours of instruction in esthetics in a licensed school of cosmetology. The examination shall include both theoretical and procedural skill questions as prescribed by the board. Any applicant may apply and is eligible for licensure upon (i) passing the written examination, (ii) completion of the required three hundred hours of instruction, and (iii) certification by a duly licensed school of satisfactory completion of all program requirements.

63 P.S. § 511(b).

[2] Act of May 3, 1933, P.L. 242, *as amended*, 63 P.S. §§ 507-527.

[3] According to the Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief (Petition), at the time it was filed, Haveman was a 26-year-old stay-at-home mother. Between 2011 and 2013, she pled guilty to several misdemeanors stemming from three incidents: a driving under the influence (DUI) charge for which she was sentenced to three days in jail, illegal possession of paraphernalia for smoking marijuana, and hitting a security guard while drunkenly resisting arrest at a casino, for which she was sentenced to two years of probation. After the casino incident, Haveman joined Alcoholics Anonymous. She has been sober ever since. *See* Petition ¶¶ 12-18. The Board provisionally denied Haveman's application in July 2016, but notified her that she could request a hearing. *See* Petition ¶¶ 9-10. Haveman did not request a hearing or appeal from the Board's decision; rather, she sent the Board a reconsideration request, which the Board did not answer. *See* Petition ¶¶ 10-11, 39-40.

When the Petition was filed, Spillane was a 33-year-old waitress who suffered from depression, anxiety and bipolar disorders, for which she began to self-medicate in high school and, eventually, developed a drug habit. Between 2005 and 2011, she pled guilty to a series of crimes including drug possession, DUI, and thefts and burglaries to fund her drug use. At age 26, she was incarcerated for two years. While incarcerated, she participated in intensive therapy and classes on resocialization and overcoming domestic abuse. She was released from a halfway house in 2013 and remains on probation until sometime in 2020. Spillane claims that she has turned her life

Facts

On December 11, 2018, Petitioners filed a Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief (Petition), seeking: (1) a declaration that the good moral character requirement of Section 5 of the Law, and all rules, regulations, policies and practices of the Board implementing that requirement are unconstitutional and facially violate the due process and equal protection clauses of the Pennsylvania Constitution; (2) an order permanently enjoining the Board from enforcing that provision against Haveman, Spillane or anyone else; and (3) attorney's fees, costs and expenses.[4]

On February 11, 2019, the Board filed preliminary objections to the Petition on the basis that the Petition was not legally sufficient (demurrer), timely or ripe for review, and because Petitioners lacked standing and failed to exhaust their administrative remedies. On March 13, 2019, Petitioners filed their response to the preliminary objections. On December 9, 2019, this Court overruled the Board's preliminary objections and directed the Board to answer the Petition. *See Haveman v. Bureau of Prof'l & Occupational Affairs, State Bd. of Cosmetology* (Pa. Cmwlth. No. 765 M.D. 2018, filed December 9, 2019). In the meantime, the parties conducted

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around and has been sober since 2010. *See* Petition ¶¶ 44-56. The Board provisionally denied Spillane's application. After a hearing, the Board denied Spillane's application in May 2015, stating: "When balancing the frequency and nature of [Spillane's] criminal convictions against the [relatively sparse] mitigating evidence she has offered, this Hearing Examiner finds that [Spillane] has not sufficiently demonstrated that she currently possesses the good moral character necessary to take the Esthetician Examination and practice the profession." Appl. Ex. 16 at 29. Spillane did not appeal from the Board's decision.

[4] According to the Petition, Petitioners "are **not** challenging their initial license denials or seeking damages based on those denials. They are seeking relief only prospectively, based on the unconstitutional burden the good [moral] character requirement is imposing on them now." Petition ¶ 122 (emphasis added). Because this action involves solely a facial challenge, Petitioners were not required to exhaust their administrative remedies. *See Lehman v. Pa. State Police*, 839 A.2d 265 (Pa. 2003); *see also Keystone ReLeaf LLC v. Pa. Dep't of Health*, 186 A.3d 505 (Pa. Cmwlth. 2018).

discovery. On January 8, 2020, the Board filed an answer and new matter to the Petition. On January 30, 2020, Petitioners filed a reply to the Board's new matter.

Petitioners filed the Application on December 20, 2019. On January 6, 2020, the Board opposed the Application. On January 21, 2020, Petitioners filed a brief in support of their Application. On February 20, 2020, the Board filed its brief in opposition to the Application and Petitioners filed a reply brief on May 22, 2020. The parties presented oral argument on June 11, 2020. The matter is ready for this Court's disposition.

Discussion

> [Pennsylvania Rule of Appellate Procedure] 1532(b) provides that '[a]t any time after the filing of a petition for review in an . . . original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.' Pa.R.A.P. 1532(b). 'An application for summary relief is properly evaluated according to the standards for summary judgment.' *Myers v. Commonwealth*, 128 A.3d 846, 849 (Pa. Cmwlth. 2015). That is, in ruling on a[n application] for summary relief, the **evidence must be viewed in the light most favorable to the non-moving party** and **the court may enter judgment only if**: (1) there are **no genuine issues of material fact; and** (2) the **right to relief is clear as a matter of law**.

Flagg v. Int'l Union, Sec., Police, Fire Prof'ls of Am., Local 506, 146 A.3d 300, 305 (Pa. Cmwlth. 2016) (emphasis added). "An application for summary relief is appropriate where a party asserts a challenge to the constitutionality of a statute and no material facts are in dispute." *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1220 (Pa. Cmwlth. 2018).

Here, Petitioners contend that there are no material facts in dispute, and they are entitled to relief because the good moral character requirement

(Requirement), on its face,[5] violates substantive due process on the basis that: (1) cosmetology does not present unique risks of crime; (2) the Requirement irrationally discriminates within the beauty industry; (3) the Board's decisions are arbitrary; and (4) in light of the Board's other powers, the Requirement is unnecessary. Petitioners also assert that the Requirement violates the right to equal protection because it irrationally distinguishes cosmetology applicants from barbers, other salon employees and practicing cosmetologists, and needlessly discriminates against people with criminal histories.

The Board responds that genuine issues of material fact exist that preclude summary relief in Petitioners' favor, and Petitioners' right to relief is not clear because the Requirement complies with the substantive due process and equal protection mandates in the Pennsylvania Constitution.

A. Clear Right to Relief

The United States (U.S.) Supreme Court has cautioned: "We must keep in mind that ''[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'' *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 . . . (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 . . .

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[5] Constitutional challenges may be facial or as-applied.

> 'A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case.' *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 16 (Pa. Cmwlth. 2012) (quotation omitted). In contrast, an as-applied challenge 'does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.' *Id.* (quotation omitted).

E. Coast Vapor, LLC v. Pa. Dep't of Revenue, 189 A.3d 504, 511 (Pa. Cmwlth. 2018). Here, Petitioners assert *only* a facial challenge in the instant matter. *See* Petition ¶¶ 3, 121, 123, 126-128, 132, 136-139, 143-144; *see also Haveman*, slip op. at 6-7, 18, 23-24; Appl. at 11-12, 30. Because Petitioners have not exhausted their administrative remedies, they could not have raised an as-applied challenge.

(1984) (plurality opinion))." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Accordingly,

> [t]here is a strong presumption in the law that legislative enactments are constitutional. *Christ the King Manor v. Dep't of Pub. Welfare*, 911 A.2d 624 (Pa. Cmwlth. 2006) (*en banc*), *aff'd per curiam*, . . . 951 A.2d 255 ([Pa.] 2008) . . . . A court will not declare a statute unconstitutional unless the constitutional violation is clear, palpable, and plain. *Id.* The court will resolve all doubts in favor of constitutionality. *Id.* Thus, a party challenging the constitutionality of a statute has a heavy burden of persuasion. *Id.*

Phantom Fireworks, 198 A.3d at 1221. "Constitutional challenges to legislative enactments present this Court with questions of law . . . ." *Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1041 (Pa. 2019).

In the instant matter, Petitioners claim that the portion of Section 5(a) of the Law, which specifies, in relevant part, that "**[a]n applicant for a limited license shall . . . be of good moral character**," 63 P.S. § 511(a) (emphasis added), is facially unconstitutional because it violates the substantive due process and equal protection clauses of the Pennsylvania Constitution.[6]

Preliminarily, the parties disagree on the proper standard for a facial constitutional challenge. Petitioners assert that the *plainly legitimate sweep* standard (i.e., a statute is facially unconstitutional if a substantial number of its potential applications are invalid) is applicable. *See* Petitioners' Br. at 12; see also Petitioners' Reply Br. at 13-14. The Board contends that the *no set of circumstances* standard

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[6] The parties refer to "cosmetology" interchangeably with "esthetics." Section 1 of the Law defines "cosmetologist" as "an individual who is engaged in the practice of cosmetology." 63 P.S. § 507. "Cosmetology" is defined therein as "also **includ[ing] the acts comprising the practice of** nail technology, natural hair braiding and **esthetics**." 63 P.S. § 507 (emphasis added). Hence, an esthetician's license is a limited cosmetology license. Moreover, Section 4(a) of the Law similarly requires that cosmetology license applicants "shall be . . . of good moral character . . . ." 63 P.S. § 510(a).

(i.e., a statute is facially unconstitutional only if there is no set of circumstances under which the statute would be valid; that is, the law is unconstitutional in all of its applications) applies. *See* Board's Br. at 11-12, 14.

In *Germantown Cab Company*, the Pennsylvania Supreme Court clarified: "A statute is facially unconstitutional only where there are no circumstances under which the statute would be valid." *Germantown Cab Co.*, 206 A.3d at 1041; *see also Wash. State Grange*; *Clifton v. Allegheny Cty.*, 969 A.2d 1197 (Pa. 2009). "A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case." *Peake v. Commonwealth*, 132 A.3d 506, 517 (Pa. Cmwlth. 2015) (quoting *Commonwealth v. Brown*, 26 A.3d 485, 493 (Pa. Super. 2011)). Accordingly, our Supreme Court explained: "In determining whether a statute is facially invalid, courts do not look beyond the statute's explicit requirements or speculate about hypothetical or imaginary cases." *Germantown Cab Co.*, 206 A.3d at 1041; *see also Wash. State Grange*.

Because *Germantown Cab Company* is the Pennsylvania Supreme Court's most recent pronouncement on evaluating facial challenges, the Board is correct that the *Germantown Cab Company* Court's *no set of circumstances* standard applies in the instant matter. Thus, the Requirement portion of Section 5(a) of the Law is facially unconstitutional if, based on its text alone, "there are no circumstances under which [it] would be valid." *Germantown Cab Co.*, 206 A.3d at 1041.

1. Substantive Due Process

> The due process clause of the Fourteenth Amendment to the [U.S.] Constitution provides that '[n]o [s]tate shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law.' U.S. CONST. amend. XIV, § 1. Due process protections also emanate from the Pennsylvania Constitution, particularly Article I, Sections 1, 9, and 11[, PA. CONST. art. I, §§ 1, 9, 11]. *Khan* [*v. State Bd. of Auctioneer Exam'rs*], 842 A.2d

> [936,] 945 [(Pa. 2004)]. Article I, Section 1 of the Pennsylvania Constitution provides: 'All 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. As this [Supreme] Court has explained, substantive due process is the 'esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice.' *Khan*, 842 A.2d at 946 (quoting *Commonwealth v. Stipetich*, . . . 652 A.2d 1294, 1299 ([Pa.] 1995) (Cappy, J., dissenting)).
>
> For substantive due process rights to attach, there must be a deprivation of a constitutionally protected interest or property right. *Khan*, 842 A.2d at 946. If the statute restricts a fundamental right, it is reviewed under strict scrutiny. If the statute impacts a protected but not fundamental right, then it is subject to rational basis review. *Khan*, 842 A.2d at 946-47; *Nixon v. Commonwealth*, . . . 839 A.2d 277, 287 ([Pa.] 2003); *cf. Wash*[.] *v. Glucksburg*, 521 U.S. 702, 721 . . . (1997) (stating that, under federal precedent, legislation restricting a right that is not fundamental is subject to rational basis review).
>
> Pursuant to Article I, Section 1 [of the Pennsylvania Constitution], protected interests include the right of an individual to pursue his or her livelihood or profession. *Khan*, 842 A.2d at 945; *Nixon*, 839 A.2d at 288. . . .
>
> [A]lthough the right to engage in a licensed profession is an important right, it is not a fundamental right. *See Nixon*, 839 A.2d at 288 (recognizing that the right to engage in a particular occupation is not a fundamental right).

Germantown Cab Co., 206 A.3d at 1042-43. Accordingly, because Petitioners' right to practice limited cosmetology impacts an important right, the rational basis test applies. *See Germantown Cab Co.*; *see also Khan*.

> The Pennsylvania Supreme Court has explained:
>
> Due process challenges under the Pennsylvania Constitution are analyzed 'more closely' under the rational basis test

than due process challenges under the [U.S.] Constitution.[FN]15 *Nixon* [], 839 A.2d at 287-88 n.15. In *Gambone v. Commonwealth*, . . . 101 A.2d 634 ([Pa.] 1954), the Pennsylvania Supreme Court succinctly defined the rational basis test applicable to substantive due process challenges brought under the Pennsylvania Constitution as follows:

> [A] law which purports to be an exercise of the police power *must not be unreasonable, unduly oppressive or patently beyond the necessities of the case*, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests *the legislature may not* arbitrarily interfere with private business or *impose unusual and unnecessary restrictions upon lawful occupations.*

Gambone, 101 A.2d at 637 (emphasis added). In *Nixon* [], our Supreme Court reaffirmed that for 'substantive due process challenges brought under the Pennsylvania Constitution, the rational basis test is that announced by this Court in *Gambone*.' *Nixon* [], 839 A.2d at 277-78 n.15. This means that **the legislature can curtail the right to engage in a chosen occupation for an important reason, but it may not do so in a way that is overly broad, *i.e.*, 'patently beyond the necessities of the case**.' *Gambone*, 101 A.2d at 637. . . .

> [FN]15 In the rational basis test used in equal protection and due process challenges brought under the [U.S.] Constitution, '**a court must uphold a statute as rational if it can conceive of any plausible reason for the statute**.' *Nixon* [], 839 A.2d at 287-88 n.15. In those challenges, it matters not whether a statutory classification will have some inequitable results. *Id.*

Peake, 132 A.3d at 518-19 (bold emphasis added; footnote omitted). "In addition, Pennsylvania balances the rights of the individual against the public interest." *Germantown Cab Co.*, 206 A.3d at 1044-45.

Hence, "[r]ational basis review requires this Court to examine whether [the Requirement portion of Section 5(a) of the Law] bears a rational relationship to a legitimate state purpose." *Germantown Cab Co.*, 206 A.3d at 1045.

a. State Objective

The parties do not contest the legitimacy of the state purpose. The Pennsylvania Supreme Court has declared that "the right to practice one's chosen profession is subject to the lawful exercise of the Commonwealth's power to protect the health, safety, welfare, and morals of the public by regulating the profession." *Germantown Cab Co.*, 206 A.3d at 1044. According to the Board, the Law's preamble states that it is "[a]n Act [t]o promote the public health and safety by providing for . . . licensing and granting of permits for those who desire to engage in the profession of cosmetology . . . ." Board's Br. at 17; Board Answer to Petition at 19. In addition, the Pennsylvania Supreme Court has specifically ruled: "**The** [act commonly referred to as the] Barber License Law[7] and the [**Law**] have but one **purpose**, and that **is the protection of patrons of** barber and **beauty shops**." *Dep't of Licenses & Inspections, Bd. of License & Inspection Review v. Weber*, 147 A.2d 326, 328 (Pa. 1959) (emphasis added); *see also Beauty Hall, Inc. v. State Bd. of Cosmetology*, 210 A.2d 495 (Pa. 1965); *King v. Bureau of Prof'l & Occupational Affairs, State Bd. of Barber Exam'rs*, 195 A.3d 315 (Pa. Cmwlth. 2018); Appl. Ex. 1 (Notes of Testimony, Chairman Tammy O'Neill (Chairman O'Neill)) at 98 ("Q The point of this process is the protection of salon patrons, correct? [Chairman O'Neill] Correct."). Accordingly, Section 5(a) of the Law has a legitimate state objective.

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[7] Act of June 19, 1931, P.L. 589, *as amended*, 63 P.S. §§ 551-567.

b. Means to Attain State Objective

Next, we must determine whether the means the General Assembly established to attain the objective (i.e., the Requirement) bears a rational (i.e., real and substantial) relationship to the objective (i.e., protecting beauty shop patrons). *See Germantown Cab Co.*

Petitioners assert in the Petition:

> 126. The [Requirement] is facially unconstitutional under this clause because it lacks a real and substantial relationship to the protection of the public health, safety, or welfare, or to any other legitimate government interest. It thus violates the right of [Petitioners] and many others like them to pursue a limited cosmetology license free from arbitrary and irrational legislation.
>
> 127. The [Requirement] is also facially unconstitutional under this clause because it is unreasonable, unduly oppressive, and patently beyond the necessities of regulating cosmetology, or of any other legitimate government interest. It thus violates the right of [Petitioners] and many others like them to pursue their chosen occupation free from arbitrary and irrational legislation.
>
> 128. The [Requirement] fails on its face to satisfy any standard of constitutional review for substantive due process rights, no matter how articulated.

Petition at 24.

> In *Gombach v. Department of State, Bureau of Commissions, Elections & Legislation*, 692 A.2d 1127 (Pa. Cmwlth. 1997), this Court explained:
>
> > Although good moral character was not defined by the General Assembly, . . . the phrase has been made constitutionally certain by our courts in terms of a person lacking 'moral turpitude.'[8]

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[8] "A '[d]etermination of whether a crime involves moral turpitude turns on the elements of the crime, not on an independent examination of the details of the behavior underlying the crime.' *Startzel v. Department of Education*, . . . 562 A.2d 1005, 1007 ([Pa. Cmwlth.] 1989)." *Garner v.*

> Good moral character is defined, in part, as including 'an absence of proven conduct or acts which have been historically considered as manifestation of moral turpitude.' [Black's Law Dictionary] 693 (6th ed. 1990). Our courts have defined moral turpitude as 'anything done knowingly contrary to justice, honesty or good morals.' *Foose* [*v. State Bd. of Vehicle Mfrs., Dealers & Salespersons*, 578 A.2d 1355, 1357 (Pa.

Bureau of Prof'l & Occupational Affairs, State Bd. of Optometry, 97 A.3d 437, 440 (Pa. Cmwlth. 2014) (footnote omitted). In *Bowalick v. Dep't of Educ.*, 840 A.2d 519 (Pa. Cmwlth. 2004), this Court concluded: "Considering . . . the cases addressing moral turpitude in different statutory contexts, . . . a crime of moral turpitude requires a reprehensible state of mind or mens rea." *Id.* at 523-24.

The Board has declared, relative to the type of crimes for which Petitioners were convicted, that assault and thefts are crimes of moral turpitude, *see* Appl. Exs. 8, 14, 17, 20, while DUI, drug possession, and possession of drug paraphernalia are not crimes of moral turpitude. *See* Appl. Exs. 9, 17.

The Court acknowledges that Governor Wolf signed the Act of July 1, 2020, P.L. 545 (Act 53), which specifies how licensing boards and commissions under the Bureau of Professional and Occupational Affairs, including the Board, shall consider criminal convictions when determining whether an individual qualifies for a professional license. In particular, Section 3113 of Act 53 prohibits the Board from disqualifying license applicants based on criminal convictions without first determining whether the convictions relate directly to the subject occupation and whether licensing the individual would pose a substantial risk to his/her clients' health and safety or substantial risk of further criminal convictions. *See* 63 Pa.C.S. § 3113, effective in 180 days (i.e., December 28, 2020). Because the instant case involves a facial challenge, Act 53 does not expressly repeal the Requirement portion of Section 5(a) of the Law (such that the Requirement may still be a bar to applicants without criminal convictions), and the applicable portion of Act 53 is not currently effective, the enactment of Act 53 does not affect the Court's analysis or ruling herein.

In her Dissent, Judge McCullough states that "[t]he Board requests that we review the impact of Act 53 to assess whether the legislation has rendered Petitioners' constitutional claims moot." *Haveman v. Bureau of Prof'l & Occupational Affairs, State Bd. of Cosmetology* (Pa. Cmwlth. No. 765 M.D. 2018, filed August 25, 2020), slip op. at 2. However, the Board merely notified the Court of Act 53 "as a change in status of authorities." July 7, 2020 Letter; *see* Pa.R.A.P. 2501(b) (change in status of authorities). In its letter, the Board did not request the Court to review the impact of Act 53. Further, Judge McCullough does not cite any authority for the Court to conduct such a review since Act 53 is not effective until December 28, 2020. Because only the current statute is before the Court, any ruling on Act 53 before its effective date would be purely advisory. *See Borough of Marcus Hook v. Pa. Mun. Ret. Bd.*, 720 A.2d 803, 804 (Pa. Cmwlth. 1998) ("It is well established that a judicial determination that is unnecessary to decide an actual dispute constitutes an advisory opinion and has no legal effect.").

> Cmwlth. 1990)] (quoting *Moretti* [*v. State Bd. of Pharmacy*, 277 A.2d 516, 518 (Pa. Cmwlth. 1971)]). From these definitions it is apparent that the two phrases, good moral character and moral turpitude, are often used together or to define each other.
>
> *Id.* at 1130.

Garner v. Bureau of Prof'l & Occupational Affairs, State Bd. of Optometry, 97 A.3d 437, 440 (Pa. Cmwlth. 2014). "Based on *Foose* and *Moretti*, we hold that **good moral character has been sufficiently defined by judicial interpretation, custom and usage so as to survive constitutional challenge. If a person has committed an act of moral turpitude, it may be determined whether that person is of good moral character**." *Gombach*, 692 A.2d at 1131 (emphasis added; quotation marks omitted).

This Court "'must uphold [the Requirement] as rational if it can conceive of any plausible reason for [it].' *Nixon* [], 839 A.2d at 287-88 n.15." *Peake*, 132 A.3d at 518 n.15. The Board proffered in its brief:

> It is important for a potential limited licensee, who will come into direct contact with a person's body, to be of good moral character. There is an inherent level of trust involved when a client of an esthetician, nail technologist or natural hair braider lets a stranger touch a part of [his/her] body. This trust is due to the knowledge of that client that the stranger touching [him/her] has been vetted by the licensing process and that the General Assembly fulfilled its duty of public protection when fashioning that process. The result is that a man or woman can be in a rather compromising position with an esthetician but feel a level of comfort knowing that the esthetician is of good moral character.

Board's Br. at 15. This Court agrees with the Board that, based on the statutory definitions of cosmetology and esthetics, that patrons seeking the services of a cosmetologist and/or esthetician place themselves in vulnerable situations. Under the

circumstances, there is a plausible reason for the Requirement.[9] Thus, even if the Requirement "will have some inequitable results[,]" *Peake*, 132 A.3d at 518 n.15, it represents a real and substantial means to attain the state objective.

Because the Requirement bears a rational relationship to its objective of protecting beauty shop patrons, Petitioners have failed to state a viable claim that the Requirement, on its face, violates substantive due process. Accordingly, Petitioners do not have a clear right to relief on their substantive due process claim.

2. Equal Protection

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Article I, Section 26 of the Pennsylvania Constitution declares: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Pa.

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[9] This Court acknowledges that Section 13(a) of the Law provides, in relevant part:

> The [B]oard shall have the power **to refuse**, revoke, refuse to renew or suspend **licenses**, upon due hearing, **on proof of violation of any provisions of this [Law], or the rules and regulations established by the [B]oard under this [Law], or for gross incompetency or dishonest or unethical practices**, or for failing to submit to an inspection of a licensee's salon during the business hours of the salon.

63 P.S. § 519(a) (emphasis added). This Court has recognized that Section 13(a) of the Law does not reference criminal convictions and, thus, allows the Pennsylvania Department of Corrections to offer cosmetology training to eligible inmates. *See Abruzzese v. Bureau of Prof'l & Occupational Affairs, State Bd. of Cosmetology*, 185 A.3d 446 (Pa. Cmwlth. 2018); *see also Bentley v. Bureau of Prof'l & Occupational Affairs, State Bd. of Cosmetology*, 179 A.3d 1196 (Pa. Cmwlth. 2018). Section 9124 of the Criminal History Record Information Act, 18 Pa.C.S. § 9124, further authorizes the Board to refuse, revoke or not renew the license of a cosmetologist/esthetician based on the applicant/licensee's felony convictions or trade-related misdemeanors. However, the fact that the Board has this additional authority at its disposal does not render the Requirement unconstitutional on its face.

Const. art. I, § 26. "Together, [Article I, Section 1 and Article I, Section 26 of the Pennsylvania Constitution] are understood to establish a right to equal protection of the laws equivalent to that established in the [U.S.] Constitution."[10] *Smires v. O'Shell*, 126 A.3d 383, 393 n.7 (Pa. Cmwlth. 2015). "Our Supreme Court has held that '[t]he Equal Protection Clause . . . does not obligate the government to treat all persons identically, but merely assures that all similarly situated persons are treated alike.'" *Garrison v. Dep't of Corr.*, 16 A.3d 560, 564 (Pa. Cmwlth. 2011) (quoting *Small v. Horn*, 722 A.2d 664, 672 (Pa. 1998)).

Petitioners assert in the Petition:

> 134. Applicants for limited cosmetology licenses are similarly situated to applicants for barber's licenses.
>
> 135. Applicants for limited cosmetology licenses are similarly situated to applicants for unlicensed jobs at spas and salons.
>
> 136. Requiring good character of applicants for limited cosmetology licenses but not of applicants for barber's licenses and unlicensed jobs at spas and salons facially violates equal protection because it bears no real and substantial relationship to the protection of the public health, safety, or welfare, or to any other legitimate government interest.
>
> 137. Requiring good character of applicants for limited cosmetology licenses but not of applicants for barber's licenses and unlicensed jobs at spas and salons facially violates equal protection because it is unreasonable, unduly oppressive, and patently beyond the necessities of regulating cosmetology, or of any other legitimate government interest.
>
> 138. Requiring good character of applicants for limited cosmetology licenses but not of applicants for barber's

[10] Accordingly, "[o]ur Supreme Court has held that the equal protection provisions of the Pennsylvania Constitution are analyzed under the same standards used by the [U.S.] Supreme Court when reviewing equal protections claims under the Fourteenth Amendment to the [U.S.] Constitution." *Muscarella v. Commonwealth*, 87 A.3d 966, 972 n.8 (Pa. Cmwlth. 2014).

> licenses and unlicensed jobs at spas and salons facially violates equal protection because it bears no rational relationship to any legitimate government interest.
>
> 139. The [Requirement] fails on its face to satisfy any standard of constitutional review for equal protection, no matter how articulated.

Petition at 25-26.

Chairman O'Neill acknowledged that, although salon receptionists, cashiers, make-up technicians and shampooers work alongside licensed cosmetologists and estheticians in salons, often with the same patrons and with similar access to their belongings, those other salon employees are not subject to the Requirement. *See* Appl. Ex. 1 at 97-99. Moreover, the General Assembly did not subject barbers to the Requirement.

Despite that the Barber License Law's purpose "is [likewise] the protection of patrons of barber . . . shops[,]" *Weber*, 147 A.2d at 328; *see also King*, the Barber License Law

> does not [similarly] prohibit licensure based on a prior conviction of any kind, nor does it require that applicants demonstrate that they are of good moral character. [*See* Section 3 of the Barber License Law,] 63 P.S. § 553 . . . . Instead, the Barber License Law requires only that applicants be at least 16 years old, have at least an eighth-grade education, have a specified amount of training and experience, and pass the applicable examinations. [*See*] 63 P.S. § 553.

King, 195 A.3d at 326.

Section 2.1 of the Barber License Law[11] defines "barbering," in relevant part, as follows:

> To shave or trim the beard; to cut, shape, trim or blend the hair with the proper tools or instruments designed for this purpose; to **shape the eyebrows**, to give **facial** and scalp **massaging, facial** and scalp **treatment, with any**

[11] Added by Section 4 of the Act of June 30, 1984, P.L. 494.

> **preparations made for this purpose, either by hand or by mechanical or electrical appliances**; to singe and shampoo the hair or apply any makes of hair cream, hair lotions or hair tonics; **to dye, color or bleach the hair** and to perform any service on a wig or hairpiece; to style and to render hair straightening, hair processing, hair weaving, hair waving and curling, with such methods as: manual, mechanical, chemical or electrical with the proper devices or proper chemical compounds developed and designed for this purpose.

63 P.S. § 552.1 (emphasis added).

Like estheticians, licensed barbers are permitted to shape/tweeze eyebrows, dye hair (including eyelashes and eyebrows), and give facial treatments and massages. *See* 63 P.S. § 507. Like cosmetologists, licensed barbers are permitted to clean, cut, color, process and remove hair, and massage the face and scalp. *See id.* Board administrator Kelly I. Diller (Diller) testified that there are salons in which both barbers and cosmetologists work. *See* Appl. Ex. 5 at 31. Yet, in its answer to the Petition, the Board acknowledged: "A barber practicing within his or her scope of practice by using tweezers to shape the eyebrows or a straight razor to shave or trim a beard is not required to be of good character." Answer to Petition ¶ 94.

Notably, Section 17 of the Law declares, in pertinent part: "Nothing in this [Law] is intended to be inconsistent with the [Barber License Law.]" 63 P.S. § 523. The Pennsylvania Supreme Court has further explained:

> The Barber License Law and the [Law] are in effect legislative [conjoined] twins. It is true they were born two years apart, but in the life of a commonwealth, and certainly in the life of the general welfare of a people, two years may be but a moment. The kinship between these two creatures of the Legislature was recognized in the [Law] by the language:
>
> 'Nothing in this [Law] is intended to be inconsistent with the [Barber License Law],' . . . 63 P.S. § 523.

> It is a cardinal rule of statutory construction that a statute must never be read, unless the text impels so extraordinary a reading, as to impart to it an absurd intent.

Weber, 147 A.2d at 328.

When Chairman O'Neill was asked "What about good character is relevant to the practice of cosmetology?," she responded: "Serving the public. It's a major part of their job, [] dealing with the public, serving the public, communicating with the public, as well as their overall success." Appl. Ex. 1 at 72. When asked: "Do you think that there's anything about cosmetology that offers specific risks of certain kinds of crime?," Chairman O'Neill responded: "No." Appl. Ex. 1 at 74-75.

However, despite that the Law was not intended to be inconsistent with the Barber License Law, 63 P.S. § 523, the long-standing conjoined twin kinship between the Barber License Law and the Law, *see Weber*, and the similarity in the services barbers and cosmetologists/estheticians are authorized to provide – sometimes in the same setting – the Requirement is imposed on cosmetologists/estheticians, but not barbers or other unlicensed salon employees. This Court agrees with Petitioners that it is absurd that, where "[e]ven if they have identical criminal records, even if they will perform similar services, even if they will stand one salon chair apart, the [L]aw requires good character of only the cosmetology applicants . . . and not the barber applicants . . . ." Petitioners' Br. at 19-20. Similarly situated licensed professionals and individuals in close contact with salon patrons and their belongings are not similarly restricted. Because there is no set of circumstances under which the Requirement would be valid in this context, the Requirement, on its face, violates the equal protection mandates of the Pennsylvania Constitution. *Germantown Cab Co.*

Accordingly, since Petitioners have made a viable claim that the Requirement, on its face, violates equal protection, they have a clear right to relief.

B. Genuine Issues of Material Fact

The Board argues that there are outstanding issues of material fact that preclude this Court from granting judgment in Petitioners' favor. Specifically, the Board asserts that "[a] genuine issue of material fact also exists as to Petitioner[s'] assertion that the Board has a 'mission to ensure good salon experiences[,]' [Petitioners'] Br. [at] 9[,]" rather than to promote patron safety. Board's Br. at 9. The Board further claims that the absence of studies, interviews or testimony that good moral character protects salon patrons, raises a factual issue to be resolved at trial. *See* Board's Br. at 9. In addition, the Board contends that the details of other Board decisions included with Petitioners' Application raise factual issues related to whether there is no circumstance under which the Requirement would be valid. *See* Board's Br. at 7. The Board also maintains that "determining the ability of the Board to apply the provisions in a constitutional manner requires resolution of disputed facts." Board's Br. at 8. Further, the Board argues that Petitioners' declaration that applicants with the wrong criminal history cannot become cosmetologists is an outstanding factual issue, since the Board routinely grants licenses to applicants with criminal histories. *See* Board's Br. at 10. However, there is no factual dispute that the Requirement's purpose is patron protection. Moreover, because Petitioners assert a facial challenge, and these purported factual issues concern the constitutionality of the Requirement as applied, they are not material to this Court's decision.[12]

The Board further asserts that Petitioners' allegation that there is nothing unique about cosmetology to justify character reviews, and the differences between barbers and other salon employees as compared to cosmetologists must also be

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[12] The record is clear that the Board approves the majority of cosmetology applications, but relies on the Requirement to scrutinize those with criminal histories and, even then, approves most of them. Notwithstanding, the Requirement's constitutionality does not turn on the number of applicants the Requirement affects. Rather, the question is whether the Requirement is rationally related to protecting salon patrons. These issues need not be presented to a factfinder for resolution.

resolved. *See* Board's Br. at 10. However, the Law specifies what services cosmetologists and estheticians are authorized to perform, and the Barber License Law details what services barbers may provide. Chairman O'Neill declared that there is nothing about cosmetology that offers specific risks of certain kinds of crime, and Diller detailed that there are other salon employees and barbers, and even prospective applicants, working in salons who are not subject to the Requirement. Therefore, these material facts are not in dispute.

Accordingly, there are no genuine issues of material fact that would preclude this Court from granting summary relief.

Conclusion

Based on the foregoing, because the Requirement, on its face, violates the equal protection mandates of the Pennsylvania Constitution, this Court grants Petitioners' Application.

ANNE E. COVEY, Judge

Judge Fizzano Cannon did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Courtney Haveman and Amanda Spillane, Petitioners	:	
v.	:	
Bureau of Professional and Occupational Affairs, State Board of Cosmetology of the Commonwealth of Pennsylvania, Respondent	:	No. 765 M.D. 2018

ORDER

AND NOW, this 25th day of August, 2020, the Application for Summary Relief filed by Courtney Haveman and Amanda Spillane is GRANTED. Section 5(a) of what is commonly referred to as the Beauty Culture Law, Act of May 3, 1933, P.L. 242, *as amended*, 63 P.S. § 511(a), is hereby declared unconstitutional and unenforceable, and the Bureau of Professional and Occupational Affairs, State Board of Cosmetology, is hereby enjoined from enforcing the good moral character requirement contained therein.

Anne E. Covey

ANNE E. COVEY, Judge

Certified from the Record

AUG 25 2020

And Order Exit

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Courtney Haveman and Amanda Spillane, Petitioners	:	
v.	:	No. 765 M.D. 2018
	:	Argued: June 11, 2020
Bureau of Professional and Occupational Affairs, State Board of Cosmetology of the Commonwealth of Pennsylvania, Respondent	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge

DISSENTING OPINION
BY JUDGE BROBSON **FILED: August 25, 2020**

Petitioners Courtney Haveman (Haveman) and Amanda Spillane (Spillane) (collectively, Petitioners) have criminal records. Because of those criminal records, Respondent Bureau of Professional and Occupational Affairs, State Board of Cosmetology (Board), denied Petitioners' applications for a limited license to practice esthetics under what is commonly referred to as the Beauty Culture Law or Cosmetology Law (Law).[1] Specifically, based on the convictions, *and only based*

[1] Act of May 3, 1933, P.L. 242, *as amended*, 63 P.S. §§ 507-527.

on the convictions,[2] the Board determined that Petitioners lacked the "good moral character" required for a limited license.[3]

Petitioners both had available administrative remedies to address the Board's separate decisions to decline their applications based on their criminal histories. Haveman, however, elected not to proceed with a hearing before the Board. The Board issued a final adjudication, denying her application on October 7, 2016. Spillane requested a hearing and received an adverse adjudication from the Board on November 4, 2015, but chose not to appeal the adjudication to this Court. Roughly two and three years later, respectively, Spillane and Haveman initiated this action in our original jurisdiction.

I agree with the Honorable Bonnie Brigance Leadbetter, who, in her dissenting opinion on December 9, 2019, would have sustained the preliminary objections of the Board to our exercise of original jurisdiction in this matter. *Haveman v. Bureau of Prof'l and Occupational Affairs, State Bd. of Cosmetology* (Pa. Cmwlth., No. 765 M.D. 2018, filed Dec. 9, 2019) (Leadbetter, S.J., dissenting). Petitioners actively participated in an administrative process that, had they seen through to fruition, would have allowed this Court to address their alleged facial

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[2] (*See* Petition for Review ¶¶ 1, 2, 26-42, 68, 69.) Petitioners also purport to advance the interests of others whose applications the Board routinely denies "under the good[ ]character requirement . . . because of criminal convictions." (*Id.* ¶ 75; *see id.* ¶ 77.)

[3] Section 5(a) of the Law, 63 P.S. § 511(a).

constitutional challenge, as well as an as applied challenge,[4] perhaps even within the two or three years prior to initiating this original jurisdiction action.[5]

For this reason, I would deny Petitioners' Application for Summary Relief and dismiss this matter for lack of original jurisdiction.[6]

P. KEVIN BROBSON, Judge

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[4] I believe that the claim in this action, while couched as a facial constitutional challenge, is, in reality, an as applied challenge to *how* the Board is applying the "good moral character" requirement to bar Spillane and Haveman from receiving licenses due to their respective criminal histories.

[5] In this regard, the administrative process did not pose too great of a burden on Petitioners. Petitioners cannot credibly argue that this Court should hear this matter as a "pre-enforcement review." *See Robinson Twp. v. Cmwlth.*, 83 A.3d 901, 990-91 (Pa. 2013) (noting defenses to original jurisdiction pre-enforcement action include concerns that "issues or facts . . . not adequately developed" and "whether [the] adversary will suffer any hardships if review is delayed"). Here, Petitioners, not the administrative process, delayed judicial review. The Board already enforced the statute against Petitioners, perhaps improperly so. Petitioners, however, abandoned the administrative process and their appeal remedies. While we have exercised our original jurisdiction in *pre*-enforcement reviews, I question the wisdom of using our original jurisdiction, rather than our appellate jurisdiction, in *post*-enforcement reviews of agency decisions. *See Pocono Manor Investors, LP v. Dep't of Envtl. Prot.*, 212 A.3d 112, 116 (Pa. Cmwlth. 2019) (en banc) ("[E]xhaustion is not a necessary prerequisite to obtaining judicial review if '[the challenged law] itself causes actual, present harm' *prior to its enforcement*." (emphasis added) (quoting *Concerned Citizens of Chestnuthill Twp. v. Dep't of Envtl. Res.*, 632 A.2d 1, 3 (Pa. Cmwlth. 1993), *appeal denied*, 642 A.2d 488 (Pa. 1994))).

[6] Alternatively, in light of the passage of the Act of July 1, 2020, P.L. 575, No. 53 (Act 53), I would invite the parties to brief the issue of mootness before ruling on Petitioners' Application. On July 17, 2020, the Board submitted a letter to the Court, pursuant to Pa. R.A.P. 2501, advising the Court of the passage of Act 53 and in which the Board, *inter alia*, contends that the passage of Act 53 "materially affects the authoritative status" of Section 5(a) of the Law.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Courtney Haveman and Amanda Spillane, Petitioners	:	
v.	:	No. 765 M.D. 2018
	:	ARGUED: June 11, 2020
Bureau of Professional and Occupational Affairs, State Board of Cosmetology of the Commonwealth of Pennsylvania, Respondent	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE CEISLER FILED: August 25, 2020

I agree with the outcome of this case and the majority's determination that rational basis review applies to this matter, pursuant to our Supreme Court's holding in *Germantown Cab Co. v. Philadelphia Parking Authority*, 206 A.3d 1030, 1041 (Pa. 2019). I also concur fully in the majority's well-reasoned conclusion that the "good moral character" requirement of Section 5(a) of the statute known as the Beauty Culture Law,[1] 63 P.S. § 511(a) (Section 5(a)), violates the equal protection provisions of both the United States and Pennsylvania Constitutions. Additionally, I agree with the majority's determination that there are no genuine issues of material fact to be resolved.

[1] Act of May 3, 1933, P.L. 242, *as amended*, 63 P.S. §§ 507-527.

I respectfully dissent, however, from that portion of the majority's opinion concluding that Section 5(a) does not facially violate the substantive due process rights of Courtney Haveman and Amanda Spillane (Petitioners) pursuant to the Fourteenth Amendment of the United States Constitution, U.S. CONST. amend XIV, § 1 ("[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law"), and Article I, Section 1 of the Pennsylvania Constitution, PA. CONST. art. I, § 1[2] ("[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"). In my view, Section 5(a)'s requirement that applicants for limited cosmetology licenses be of "good moral character" violates substantive due process requirements and is facially unconstitutional for this additional reason.

I. Background

Petitioners are two women who want to become estheticians, which are cosmetologists who focus on skincare. This requires only a limited license rather than a full cosmetology license, but the State Board of Cosmetology (Board) applies the "good moral character" requirement equally to both types of licenses. 63 P.S. § 511(a). Petitioners have criminal records from when they were younger and struggling with substance abuse, but they have turned their lives around. Both have been clean/sober and successful for years. Both graduated from beauty school and received job offers from salons. Ms. Spillane even went through a humiliating hearing before the Board to prove she is a good person. Under the good character requirement, however, the Board rejected both Petitioners' license applications, even

[2] *See Germantown Cab Co. v. Phila. Parking Auth.*, 206 A.3d 1030, 1042-43 (Pa. 2019) (citing PA. CONST. art. I, § 1 as a source of substantive due process rights).

though Petitioners' criminal histories have nothing to do with cosmetology. Pursuant to the good character requirement, the Board routinely scrutinizes applicants because of irrelevant criminal convictions. Then, for an applicant whose application is initially denied and who agrees to undergo a hearing to continue pursuing licensure, the hearing process is grueling. Applicants are required to reveal intensely personal and painful experiences to the Board. Moreover, the process of considering the applicant's character can easily take a year, while the applicant is waiting and unable to practice her chosen career.

II. Due Process and the "Good Moral Character" Requirement

Article I, Section 1 of the Pennsylvania Constitution guarantees "an individual's right to engage in any of the common occupations of life." PA. CONST. art. I, § 1; *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10, 20 (Pa. Cmwlth. 2012) (*en banc*). "[T]he legislature can curtail the right to engage in a chosen occupation for an important reason, but it may not do so in a way that is overly broad." *Peake v. Commonwealth*, 132 A.3d 506, 519 (Pa. Cmwlth. 2015) (*en banc*). "'Under the guise of protecting the public interests *the legislature may not* arbitrarily interfere with private business or *impose unusual and unnecessary restrictions upon lawful occupations*.'" *Id.* (quoting *Gambone v. Commonwealth*, 101 A.2d 634, 637 (Pa. 1954)) (emphasis in *Peake*).

Petitioners contend the statutory "good moral character" requirement deprives them of their chosen occupations and thereby violates their substantive due process rights. The sole purpose of Pennsylvania's cosmetology laws is to protect patrons of beauty salons. *Dep't of Licenses & Inspections, Bd. of License & Inspection Review v. Weber*, 147 A.2d 326, 328 (Pa. 1959). As Petitioners correctly point out,

Section 5(a)'s good character requirement facially lacks a "real and substantial relation" to that purpose. *Peake*, 132 A.3d at 519.

Good character has nothing to do with protecting beauty salon patrons. Indeed, the Board admits that it has no evidence that the good character requirement protects salon customers. *See* Appl. for Summary Relief, Ex. 7 (Board could not identify evidence that the requirement serves a purpose). In fact, the Board already has separate authority to withhold licenses for misbehavior that is related to cosmetology.

Moreover, the good character requirement is unconstitutionally imprecise and arbitrary. "The touchstone of due process is protection of the individual against arbitrary action of the government." *Peake*, 132 A.3d at 518 (quoting *Nixon v. Commonwealth*, 839 A.2d 277, 287 (Pa. 2003)); *see also Johnson*, 59 A.3d at 20 ("The substantive protections of due process are meant to protect citizens from arbitrary and irrational actions of the government."). By definition, arbitrary laws do not advance state interests.

The Board argues Petitioners cannot sustain a facial challenge because they cannot show the statute is invalid in all circumstances. The Board posits that its decisions granting licenses to some applicants with criminal records demonstrate that the statute is constitutional as applied in those cases. However, the Board's uneven application of its prejudice against former criminals is not relevant to whether the statute is facially unconstitutional.

The Board also argues that good moral character may be important to eligibility for professional licenses. The Board points to this Court's approval of such a requirement for notaries and asserts it has applied the "good moral character" standard of Section 5(a) similarly. Again, this is not relevant to whether that

standard is constitutionally permissible for estheticians. Moreover, the standard's importance for notaries is self-evident; the same is not true for cosmetologists.

Rational basis review "require[s] an individual challenging legislation to show either that the legislation does not further a legitimate state interest[] or that the legislation is not rationally related to this legitimate state interest." *Germantown Cab Co.*, 206 A.3d at 1044 (citing *Washington v. Glucksburg*, 521 U.S. 702, 728 (1997), and *Romer v. Evans*, 517 U.S. 620, 635 (1996)). "In addition, Pennsylvania balances the rights of the individual against the public interest." *Germantown Cab Co.*, 206 A.3d at 1044-45.

Here, there is facially no rational relation between the "good moral character" requirement of Section 5(a) and the legislature's asserted interest in public health and safety. Further, Petitioners persuasively argue that their individual rights outweigh any indeterminate public interest. In this regard, it is notable that the Board simply asserts that the "good moral character" requirement of Section 5(a) bears a rational relation to the public interest because the legislature is presumed to make decisions based on the public interest. This circular argument does not support the Board's contention that the public interest outweighs that of Petitioners for purposes of rational basis review.

Finally, the Board contends good moral character is important because clients must be able to trust their estheticians, as estheticians are in physical contact with clients. The Board asserts, with absolutely no supporting evidence, that clients may find themselves "in a rather compromising position" with an esthetician (although apparently not with a barber using a straight razor) and need the comfort of knowing the person touching them is of good moral character. This bald assertion is simply without record support. Thus, the Board has failed to point to any specific set of

circumstances in which Section 5(a) would bear a rational relation to the legislative purpose of protecting beauty salon patrons.[3]

For these reasons, I conclude that Section 5(a) facially violates constitutional rights of substantive due process, as well as equal protection rights, under rational basis review. I would grant Petitioners' requested relief on this additional basis. Therefore, I respectfully dissent from that portion of the majority's decision concluding that Section 5(a) does not facially violate Petitioners' substantive due process rights.

Ellen Ceisler

ELLEN CEISLER, Judge

[3] Significantly, the legislature recently amended statutory licensing requirements to eliminate the consideration of a cosmetology license applicant's criminal history in determining good moral character. Specifically, under Section 3113(a) and (a.1) of the Act of July 1, 2020, P.L. 53 (Act 53), licensing boards can no longer determine "good moral character" of cosmetology license applicants in conjunction with criminal convictions. *See* 63 Pa. C.S. § 3113(a) & (a.1). Instead, the legislature has provided detailed analytical guidelines under which the relevant licensing board must first determine whether the applicant's prior criminal conviction is directly related to the ability to perform the licensed activity. That direct relation is to be determined objectively by whether the criminal statute at issue is included in a statutory list (which is yet to be developed). 63 Pa. C.S. § 3113(b)(1). If the criminal conviction is not directly related to the occupation at issue, the licensing board will proceed to determine whether the requested licensure would pose a substantial risk to the applicant's patients or clients. 63 Pa. C.S. § 3113(b)(2).

Act 53 also provides a mechanism by which a prospective license applicant can obtain a preliminary opinion from a licensing board, in order to determine the board's position on the applicant's prior criminal conviction and its likely effect on licensure, before the applicant expends time and money in seeking training in the prospective occupation. 63 Pa. C.S. § 3115. The inability to obtain such advance information was a consideration asserted by Petitioners here.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Courtney Haveman and Amanda Spillane,	:	
Petitioners	:	No. 765 M.D. 2018
v.	:	
	:	Argued: June 11, 2020
Bureau of Professional and Occupational Affairs, State Board of Cosmetology of the Commonwealth of Pennsylvania,	:	
Respondent	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge

DISSENTING OPINION
BY JUDGE McCULLOUGH

FILED: August 25, 2020

Here, the Bureau of Professional and Occupational Affairs, State Board of Cosmetology of the Commonwealth of Pennsylvania (Board) denied the applications of Courtney Haveman and Amanda Spillane (Petitioners) for licensure as estheticians on the basis that they did not satisfy the "good moral character" requirement of section 5(a) of the statute known as the Beauty Culture Law,[1] 63 P.S. §511(a). Thereafter, Petitioners did not petition this Court for review. Instead, Petitioners filed the instant action in our original jurisdiction as a petition for review

[1] Act of May 3, 1933, P.L. 242, *as amended*, 63 P.S. §§507-527.

in the nature of declaratory and injunctive relief, seeking an order decreeing that the "good moral character" requirement is unconstitutional on its face.

While I agree that there are significant constitutional issues that would be applicable here, I believe we must first address the issue of mootness for failure to exhaust administrative remedies, a procedure which, if pursued through its natural course, could have provided Petitioners with an adequate remedy.

Although petitioners need not avail themselves of or even exhaust administrative remedies when they lodge a facial constitutional challenge to a statutory provision, *see East Coast Vapor, LLC v. Pennsylvania Department of Revenue*, 189 A.3d 504, 511 (Pa. Cmwlth. 2018) (en banc), Petitioners here decided to apply for licensure and elected to pursue the administrative process with and through the Board. Yet, along with that administrative channel and procedure came an automatic right to file a petition for review with this Court. *See Pittman v. Pennsylvania Board of Probation and Parole*, 159 A.3d 466, 474 (Pa. 2017). In *Lehman v. Pennsylvania State Police*, 839 A.2d 265 (Pa. 2003), our Supreme Court explained that petitioners' "facial challenges to a statute's constitutionality need not be raised before the administrative tribunal to be reviewed by an appellate court." *Id.* at 275. In so deciding, our Supreme Court confirmed that this Court could have entertained Petitioners' constitutional claims on direct appeal from the Board.

However, Petitioners chose to not file a petition for review with this Court from the Board's order denying their applications. During the pendency of this appeal, on July 17, 2020, the Board filed a submission with this Court, contending that the enactment of the Act of July 1, 2020, P.L. 575, No. 53 (Act 53), severely altered its authority to implement the "good moral character" requirement of section 5(a), namely the manner in which it may or can take into consideration past criminal convictions when deciding to grant licensure. The Board requests that

we review the impact of Act 53 to assess whether the legislation has rendered Petitioners' constitutional claims moot. Because I believe the parties must first address the effect that this Act may have on section 5(a), *see Department of Environmental Resources v. Jubelirer*, 614 A.2d 204, 211-212 (Pa. 1992), I must respectfully dissent.

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge

IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al.,
***Petitioners*,**

v.

THE COMMONWEALTH OF PENNSYLVANIA, et al.
***Respondents*.**

BRIEF OF AMICI CURIAE, PENNSYLVANIA AFL-CIO AND OTHER PENNSYLVANIA UNIONS IN SUPPORT OF PETITIONERS

Upon Review of the Commonwealth Court's Recommended Findings of Fact and Conclusions of Law in Case No. 261 M.D. 2017

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III. ARGUMENT

The Pennsylvania Constitution affords more robust protections than the federal constitution for free speech and assembly, voting and free and fair elections, and equality and non-discrimination. Their inclusion in the original and current state constitution ensures popular sovereignty and a representational democracy in our Commonwealth. They demand this Court interpret them separate and apart from the federal constitution. If so treated, the 2011 congressional plan cannot withstand constitutional scrutiny.

A. Pennsylvania's Constitutional Framework.

Pennsylvania enjoys the distinction of being among the first States to create meaningful popular sovereignty whereby the people select their elected officials. Ken Gormley, *et al*., *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 216 (2004); Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776-1791*, 67 Temp. L. Rev. 575, 588-92 (1993); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541, 548-61 (1989). Pennsylvania's very first constitution, the Pennsylvania Constitution of 1776 ("1776 Constitution"), represented a radical break from governance by elites to governance by the people brought about by election of representatives:

"The [supporters of the 1776 Constitution] intended to bring the entire government – legislature and executive – within the control of the people, whom they naturally identified with themselves." Herrington, *supra*, at 588. The whole purpose of the effort of popular sovereignty was to make significant strides toward what President Lincoln would later describe as "a government by the people, for the people, and of the people." *Id*. at 580.

In 1776, Pennsylvania served as the "laboratory" of constitution-making for other States to observe. Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 85 (1969). That constitution reflected an "urban variant of republicanism that fostered egalitarianism as well as economic enterprise." Robert Shalhope, *Republicanism and Early American Historiography*, 39 Wm. & Mary Q. 334, 341 (3d ser. 1982*).* The document literally "mark[ed] the outer limits of the Revolution." Richard A. Ryerson, *Republican Theory and Partisan Reality in Revolutionary Pennsylvania: Toward a New View of the Constitutionalist Party,* in *Sovereign States in an Age of Uncertainty* 95, 96 (Ronald Hoffman & Peter J. Albert eds., 1981).

Today, the 1776 Constitution still forms the basis of Pennsylvania's current constitution. Its egalitarian quality has to do with the *structure* of the government as well as *popular participation in governing*

through voting and office-holding. The rights specified in both the Pennsylvania Declaration of Rights and the Frame of Government in the 1776 Constitution were aimed more at reinforcing republican government than at guaranteeing individual rights. Robert Palmer, *Liberties as Constitutional Provisions, 1776-1791*, in William Nelson & Robert Palmer, *Liberty and Community: Constitution and Rights in the Early American Republic* 64, 68 (1987). Among the primary means by which the 1776 Constitution achieved its goal of providing representational democracy were its provisions ensuring the rights to free speech, association, voting, free and equal elections, and equality.

The Declaration of Rights in the 1776 Constitution included provisions guaranteeing the rights of speech, press, assembly, and to petition the government for a redress of grievances. Section XII of the Declaration of Rights states: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Pa. Const. of 1776, ch. 1 (Decl. of Rights), § XII. The 1776 Constitution was the first state constitution to protect "the freedom of speech and of writing." Livingston Rowe Schuyler, *The Liberty of the Press in the American Colonies Before the Revolutionary War* 77 (1905).

Additionally, the Declaration of Rights included a provision to protect the right to assembly and to petition the government for redress of grievances. Section XVI of the Declaration of Rights states "[t]hat the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance." Pa. Const. of 1776, ch. 1 (Decl. of Rights), § XVI. This provision was unique during the revolutionary period as only the Vermont Constitution of 1777 and the North Carolina Constitution of 1776 included a similar provision. Gormley, *supra*, at 251 n.3. Meaningful petitions to redress grievances can only be achieved if voices of the people can be heard – gerrymandered districts by their very nature undermine this goal.

Pennsylvania's original 1776 Declaration of Rights also reflected a number of equality concerns. Palmer, *supra*, at 68. This early, written enumeration of rights was influential in other States, as well as in Europe. *See* Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* 85-91 (1977); George A. Billias, *American Constitutionalism and Europe, 1776-1848*, in *American Constitutionalism Abroad* 13 (1990). Section I of the 1776 Pennsylvania Declaration of Rights provided: "All 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. of 1776, ch. 1 (Decl. of Rights), § I. Only two others in the early group of newly-independent States that wrote constitutions included similar provisions in theirs: Virginia in 1776, several months prior to Pennsylvania, and Massachusetts in 1780. *See* Va. Const. of 1776, ch. 1 (Decl. of Rights), § 1; Mass. Const. of 1780, pt. I, art. I. These provisions set a pattern for later clauses now contained in many state constitutions.

Furthermore, the 1776 Constitution achieved its goal of representational democracy by extending the franchise to an entire class of individuals who had otherwise been barred from voting. Gormley, *supra*, at 216; Herrington, *supra*, at 580; Williams, *supra*, at 557. In a remarkable break from Pennsylvania's past as well as that of other fledgling States in the Americas, the 1776 Constitution extended the franchise to the non-propertied, making Pennsylvania among the first States to do so. Gormley, *supra*, at 216; Herrington, *supra*, at 580. As stated by one legal scholar:

> [The 1776 Constitution] undeniably lived up to its radical moniker . . . in the extension of the franchise. The dramatic reduction in property requirements brought thousands of farmers, artisans, and mechanics into the electorate for the first time and instigated the development of a new breed of

> politics and politicians. The masses were, suddenly, politically relevant.

Herrington, *supra*, at 580. Rather than limit the franchise to those who owned property, the 1776 Constitution allowed all freemen to vote, regardless of race, as long as they had paid taxes within the year prior to the election. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*, 329 (2000).

The 1776 Constitution also achieved greater participatory democracy through a provision that remains, although slightly modified, in our constitution to this day. Gormley, *supra*, at 216-17. That provision stated: "That all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or be elected into office." *Id*. at 217 (citing Pa. Const. of 1776, ch. 1 (Decl. of Rights), § VII).

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159 MM 2017

IN THE

Supreme Court of Pennsylvania

Middle District

159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,

Petitioners,

v.

THE COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA GENERAL ASSEMBLY; THOMAS W. WOLF, IN HIS CAPACITY AS GOVERNOR OF PENNSYLVANIA; MICHAEL J. STACK III, IN HIS CAPACITY AS LIEUTENANT GOVERNOR OF PENNSYLVANIA AND PRESIDENT OF THE PENNSYLVANIA SENATE; MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; JOSEPH B. SCARNATI III, IN HIS CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE; ROBERT TORRES, IN HIS CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JONATHAN M. MARKS, IN HIS CAPACITY AS COMMISSIONER OF THE BUREAU OF COMMISSIONS, ELECTIONS, AND LEGISLATION OF THE PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

On Appeal from the Commonwealth Court of Pennsylvania at No. 261 MD 2017

BRIEF FOR *AMICUS CURIAE* COMMON CAUSE

MARTIN J. BLACK (I.D. NO. 54319)
SHARON K. GAGLIARDI (I.D. NO. 93058)
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The free and equal election clause should not be treated as surplusage to these provisions. Under ordinary rules of construction, these specific words of the Pennsylvania Constitution should be interpreted and given effect as part of the integrated whole of the Constitution, not simply subsumed into Sections 1 and 26, let alone federal jurisprudence. *Jubelirer v. Rendell*, 598 Pa. 16, 39 (2008). The text demands interpretation, and the history of the provision provides the context for doing so.

B. History of the Provision

1. Textual History

As this Court has observed, the Pennsylvania Constitutional Convention of 1776 was a seminal event in the development of the American form of government: "The Constitution that emerged from the convention, which came to be a model for other state charters, added extensive and now-familiar procedural protections, intra-governmental checks and balances, and a detailed declaration of rights." *William Penn School District v Pennsylvania Dep't of Education*, 170 A.3d 414, 419 (Pa. 2017). Chapter I, Section VII of the Declaration of Rights, approved by the Convention on September 28, 1776, stated: "That all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office." Pa. Const. of 1776, ch. I, § VII. That provision and other

innovations in the 1776 Constitution expanded the franchise to groups who historically had lacked the right to vote, such as farmers, artisans and mechanics, and was considered to be a radical departure from prior forms of government. Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776-1791*, 67 Temp. L. Rev. 575, 580 (1993).

In the fall of 1790, the Pennsylvania Constitutional Convention adopted a new Constitution that included a simple, plain statement enshrining the right to fair elections as a constitutional right:

> That the general, great, and essential principles of liberty and free Government may be recognized and unalterably established, WE DECLARE,
>
> . . .
>
> Of elections.
> Sect. V. That elections shall be free and equal.

Pa. Const. of 1790, art. IX, pmbl, § V. During the Constitutional Convention of 1872-73, Section V was amended to read: "Freedom of elections. Section 5. Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. of 1874, art. I, § 5. The provision has remained unchanged since 1874.

In contrast to the long history undergirding the free and equal elections clause, there was no analog to the provision in the United States Constitution. The federal Constitution says little about Congressional elections, committing the

selection of representatives and senators largely to the states, subject to minimum age and eligibility requirements. U.S. Const. art. I, §§ 2-4. Indeed, at the founding of the nation, the relationship between the federal government and the rights of its state's citizens was a controversial issue. *Constitution of the United States—A History*, National Archives, https://www.archives.gov/founding-docs/more-perfect-union (last reviewed June 26, 2017). The original federal Constitution had no declaration of rights, and what is now known as the Bill of Rights was passed by amendment following much debate during the first Congress. *Id*. The Bill of Rights guarantees freedom of religion, freedom of speech and various other individual rights, but it says nothing about equality or free elections. U.S. Const. amends. I-X.

Thus, the Pennsylvania Constitution from its very early days enshrined the right to free and equal elections as one of the "general, great, and essential principles of liberty and free Government." Pa. Const. of 1790, art. IX, pmbl. The federal Constitution was silent.

While Respondents imply that the Pennsylvania Constitution should be read to approve of today's aggressive partisan gerrymandering techniques, the Pennsylvania Framers could not have approved a practice that did not yet exist. Indeed, there is little doubt how the Pennsylvania Framers would have viewed modern gerrymandering. If Benjamin Franklin had been told that future politicians

would have access to a machine capable of predicting voting preferences, and politicians would use the information to devise voting districts favorable to their factions, is there any doubt how he would have viewed the matter? Respondents seem to believe that it is part of the spoils of political war to redraw the district boundaries to entrench the victor. Plainly, the Founders would have taken a different view. It is inconceivable that, having radically expanded the right to vote, created a constitution with careful checks and balances to prevent factionalism, and guaranteed free and equal elections to all, they would have approved of modern gerrymandering techniques. The fact that the Framers did not outlaw what they could not predict is hardly evidence of acquiescence, much less constitutionality.

2. Pennsylvania case law

Pennsylvania case law supports applying Pennsylvania constitutional standards to the unique free and equal elections clause. In the analogous area of freedom of speech, the Court has observed that the Pennsylvania right to free speech is broader than the federal right and was the ancestor to, not the descendant of, the First Amendment. *Pap's A.M. v. City of Erie*, 571 Pa. 375, 399 (2002). The Pennsylvania free speech clause antedated the First Amendment by 15 years. There has never been a free and equal elections clause in the federal constitution, and the closest provision, the Fourteenth Amendment, which calls for "equal protection of the laws" was passed in 1868, 92 years after Pennsylvania declared

[J-1-2018]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, CARMEN FEBO SAN MIGUEL, JAMES SOLOMON, JOHN GREINER, JOHN CAPOWSKI, GRETCHEN BRANDT, THOMAS RENTSCHLER, MARY ELIZABETH LAWN, LISA ISAACS, DON LANCASTER, JORDI COMAS, ROBERT SMITH, WILLIAM MARX, RICHARD MANTELL, PRISCILLA MCNULTY, THOMAS ULRICH, ROBERT MCKINSTRY, MARK LICHTY, LORRAINE PETROSKY,	:	No. 159 MM 2017
	:	On the Recommended Findings of Fact and Conclusions of Law of the Commonwealth Court of Pennsylvania entered on 12/29/18 at No. 261 MD 2017
	:	ARGUED: January 17, 2018
Petitioners	:	
v.	:	
THE COMMONWEALTH OF PENNSYLVANIA; THE PENNSYLVANIA GENERAL ASSEMBLY; THOMAS W. WOLF, IN HIS CAPACITY AS GOVERNOR OF PENNSYLVANIA; MICHAEL J. STACK III, IN HIS CAPACITY AS LIEUTENANT GOVERNOR OF PENNSYLVANIA AND PRESIDENT OF THE PENNSYLVANIA SENATE; MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; JOSEPH B. SCARNATI III, IN HIS CAPACITY AS PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE; ROBERT TORRES, IN HIS CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JONATHAN M. MARKS, IN HIS CAPACITY AS COMMISSIONER OF THE	:	

BUREAU OF COMMISSIONS, ELECTIONS, AND LEGISLATION OF THE PENNSYLVANIA DEPARTMENT OF STATE, :
:
:
:
:
Respondents :

OPINION

JUSTICE TODD **FILED: February 7, 2018**

It is a core principle of our republican form of government "that the voters should choose their representatives, not the other way around."[1] In this case, Petitioners allege that the Pennsylvania Congressional Redistricting Act of 2011[2] (the "2011 Plan") does the latter, infringing upon that most central of democratic rights – the right to vote. Specifically, they contend that the 2011 Plan is an unconstitutional partisan gerrymander. While federal courts have, to date, been unable to settle on a workable standard by which to assess such claims under the federal Constitution, we find no such barriers under our great Pennsylvania charter. The people of this Commonwealth should never lose sight of the fact that, in its protection of essential rights, our founding document is the ancestor, not the offspring, of the federal Constitution. We conclude that, in this matter, it provides a constitutional standard, and remedy, even if the federal charter does not. Specifically, we hold that the 2011 Plan violates Article I, Section 5 – the Free and Equal Elections Clause – of the Pennsylvania Constitution.

[1] Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005), quoted in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015).

[2] Act of Dec. 22, 2011, P.L. 599, No. 131, 25 P.S. §§ 3596.101 *et seq.*

The challenge herein was brought in June 2017 by Petitioners, the League of Women Voters[3] and 18 voters – all registered Democrats, one from each of our state's congressional districts – against Governor Thomas W. Wolf, Lieutenant Governor Michael J. Stack, III, Secretary Robert Torres, and Commissioner Jonathan M. Marks (collectively, "Executive Respondents"), and the General Assembly, Senate President Pro Tempore Joseph B. Scarnati, III, and House Speaker Michael C. Turzai (collectively, "Legislative Respondents").[4] [5] Petitioners alleged that the 2011 Plan violated several provisions of our state Constitution.

On January 22, 2018, this Court entered a *per curiam* order[6] agreeing with Petitioners, and deeming the 2011 Plan to "clearly, plainly and palpably violate[]" our state Constitution, and so enjoined its further use.[7] *See* Order, 1/22/18. We further

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[3] On November 17, 2017, the Commonwealth Court dismissed the League of Women Voters from the case based on a lack of standing. On the presentations before us, *see* Petitioners' Brief at 41 n.5, and given our resolution of this matter, we do not revisit that decision.

[4] A similar challenge, under federal law, was brought by citizen-petitioners against the Governor, the Secretary, and the Commissioner in federal district court, contending that Plan violates the Elections Clause, Article I, Section 4, of the federal Constitution. Trial in that case was held in December, one week prior to the trial in the instant matter. In a 2-1 decision, on January 10, 2018, the three-judge panel of the United States District Court for the Eastern District of Pennsylvania rejected the petitioners' challenge. *See Agre v. Wolf*, No. 17-4392, 2018 WL 351603 (E.D. Pa. Jan. 10, 2018).

[5] On November 13, 2017, the Commonwealth Court permitted to intervene certain registered Republican voters from each district, including announced or potential candidates for Congress and other active members of the Republican Party (the "Intervenors").

[6] To our Order, Justice Baer filed a Concurring And Dissenting Statement, Chief Justice Saylor filed a Dissenting Statement, joined by Justice Mundy, and Justice Mundy filed a Dissenting Statement.

[7] In our order, we excepted the March 13, 2018 special election for Pennsylvania's 18th Congressional District. *See* Order, 1/22/18, ¶ "Sixth."

provided that, if the General Assembly and the Governor did not enact a remedial plan by February 15, 2018, this Court would choose a remedial plan. For those endeavors, we set forth the criteria to be applied in measuring the constitutionality of any remedial plan, holding that:

> any congressional districting plan shall consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.

Order, 1/22/18, ¶ "Fourth."[8] Our Order indicated that an opinion would follow. This is that Opinion, and we emphasize that, while explicating our rationale, nothing in this Opinion is intended to conflict with, or in any way alter, the mandate set forth in our Order of January 22, 2018.[9]

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[8] On January 23, 2018, Legislative Respondents filed with this Court an application for a stay of our Order, alleging the Order would have a chaotic effect on the 2018 elections, and arguing the Order implicated an important question of federal law on which they would base an appeal to the United States Supreme Court. Intervenors filed a similar application. Both applications were denied on January 25, 2018, with dissents noted by Chief Justice Saylor, and Justices Baer and Mundy. On January 26, 2018, Legislative Respondents filed with the United States Supreme Court an emergency application for a stay of this Court's January 22, 2018 Order; the application was denied on February 5, 2018.

[9] A brief description of the Court's process in issuing orders with opinions to follow is instructive. Upon agreement of the majority of the Court, the Court may enter, shortly after briefing and argument, a *per curiam* order setting forth the court's mandate, so that the parties are aware of the court's ultimate decision and may act accordingly. This is particularly so in election matters, where time is of the essence. Justices in the minority, or who disagree with any part of the order, may issue brief concurring or dissenting statements, or may simply note their concurrence with or dissent from the order.

The Court is, however, still a deliberative body, meaning there is a back-and-forth nature not only to decision-making, but to legal analysis. Many analyses, such as those in this case, are complex and nuanced. Thus, the Court's process involves, in the first instance, the drafting of an opinion by the majority author, and, of course, involves exhaustive research and multiple interactions with other Justices. Once a majority (continued…)

I. Background

A. Redistricting Mandate

Article I, Section 2 of the United States Constitution requires that a census be taken every 10 years for the purpose of apportioning the United States House of Representatives. Following the 2010 federal census, Pennsylvania's share in the House was reduced from 19 to 18 members.[10] As a result, the Commonwealth was required to redraw its congressional district map.

Pennsylvania's congressional districts are drawn by the state legislature as a regular statute, subject to veto by the Governor.[11] While this process is dictated by federal law, it is delegated to the states. The federal Constitution's Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," unless Congress should "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. Pursuant to the Elections Clause, Congress passed 2 U.S.C. § 2a, which provides that,

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(…continued)
opinion is completed, it is circulated to all of the other Justices for their review and comment. At that point, each of the other Justices has the opportunity to write his or her own concurring or dissenting opinions, expressing that Justice's ultimate views on the issues presented. These responsive opinions are then circulated to the other Justices for their responses, if any. Only then, after every member of the Court has been afforded the time and opportunity to express his or her views, are the opinions finalized. At that point, a majority opinion, along with any concurring and dissenting opinions, are filed with our Prothonotary and released to the public. It is a process, and it is one to which this Court rigorously adheres.

[10] Public Law 94-171, enacted by Congress in 1975, requires the Census Bureau to deliver redistricting results to state officials for legislative redistricting. *See* 13 U.S.C. § 141. For the 2010 federal census, the Census Bureau was required to deliver redistricting data to the states no later than April 1, 2011.

[11] By contrast, the state legislative lines are drawn by a five-member commission pursuant to the Pennsylvania Constitution. *See* Pa. Const. art. II, § 17.

following the decennial census and reapportionment, the Clerk of the House of Representatives shall "send to the executive of each State a certificate of the number of Representatives to which such State is entitled" and the state shall be redistricted "in the manner provided by the law thereof." 2 U.S.C. § 2a. If the state does not do so, Representatives are to be elected as further provided in Section 2a.[12]

B. Plan Passage

The 2011 Plan, Senate Bill 1249, was enacted on December 22, 2011, setting forth Pennsylvania's 18 congressional districts.[13] In the November 2010 general election, voters elected Republicans to majorities in both houses of the General Assembly and elected a Republican, Tom Corbett, as Governor. Thus, in 2011, the Republican-led General Assembly was tasked with reconstituting Pennsylvania's congressional districts, reducing their number by one, and adjusting their borders in light of population changes reflected by the 2010 Census. On May 11, June 9, and June 14, 2011, the Pennsylvania House and Senate State Government Committees held hearings on the subject of redistricting, for the ostensible purpose of receiving testimony and public comment on the subject of redistricting generally. On September 14, 2011, Senate Bill 1249, Printer's Number 1520, principally sponsored by the Republican leadership, was introduced, but contained absolutely no information concerning the

[12] Both the Elections Clause and Section 2a have been interpreted as envisioning that the redistricting process will be subject to state law restrictions, including gubernatorial veto, judicial remedies, citizen referenda, and even the reconstitution, via citizen initiative, of the authority to redistrict into independent redistricting agencies. The role of courts generally, and this Court in particular, in fashioning congressional districts is a matter we discuss more fully below in Part VI, "Remedy."

[13] This history is based on the joint stipulation of the parties. *See* Joint Stipulation of Facts, 12/8/17.

boundaries of any congressional districts. On December 7, 2011, the bill was brought up for first consideration, and, on December 11, 2011, for second consideration.

Thereafter, the bill was referred to the Senate State Government Committee, where, on December 14, 2011, it was amended and reprinted as Senate Bill 1249, Printer's Number 1862, now providing proposed boundaries for each of Pennsylvania's 18 congressional districts, before being reported out of committee. The same day, the bill was referred to the Senate Appropriations Committee, where it was again amended and reprinted as Senate Bill 1249, Printer's Number 1869, and reported out of committee to the floor. There, Democratic Senator Jay Costa introduced an amendment to the bill he indicated would modify it to create 8 Republican-favorable districts, 4 Democrat-favorable districts, and 6 swing districts, but the Senate declined to adopt the amendment and passed Senate Bill 1249, Printer's Number 1869, in a 26-24 vote, with all Democrats voting against passage. The same day, Senate Bill 1249, Printer's Number 1869, proceeded to the House of Representatives, where it was referred to the House State Government Committee, and reported out of committee. The next day, on December 15, 2011, Senate Bill 1249, Printer's Number 1869, was brought up for first consideration, and, on December 19, 2011, second consideration. On December 20, 2011, the bill was referred to the House Appropriations Committee, reported out of the committee, and passed in a 136-61 vote, with 36 Democrats voting in favor of passage.[14] On December 22, 2011, Senate Bill 1249, Printer's Number 1869, proceeded to the governor's desk where then-Governor Corbett signed it into law as Act 131 of 2011, the 2011 Plan.

[14] Notably, 33 of the 36 Democrats who voted in favor of passage serve districts within the 1st, 2nd, 13th, 14th, or 17th Congressional Districts, which, as detailed herein, are safe Democratic districts under the 2011 Plan.

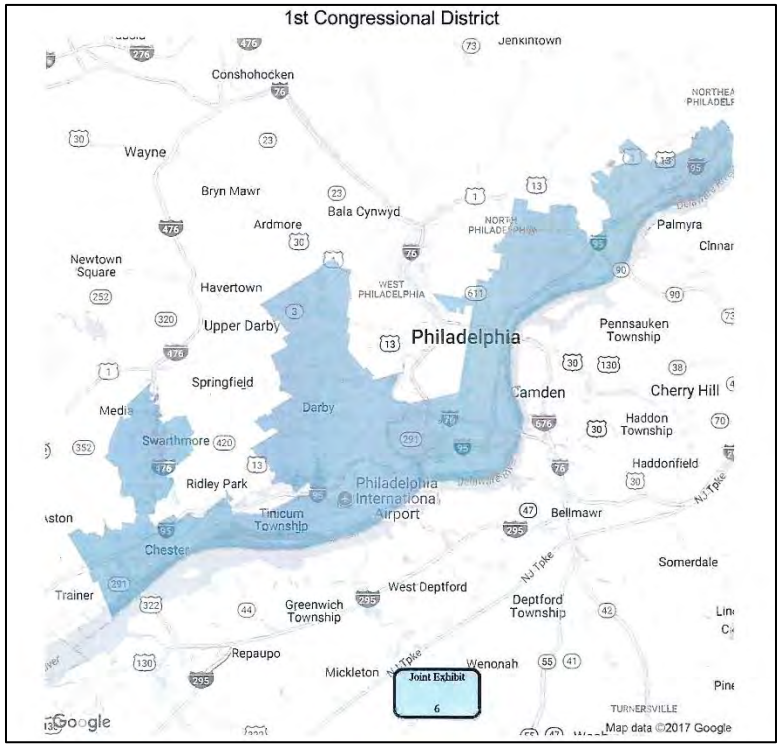
C. The 2011 Plan

A description of the 2011 Plan and some of its characteristics is appropriate.[15] A map of the entire 2011 Plan is attached as Appendix A.

1. The Districts

a. 1st Congressional District

The 1st Congressional District is composed of parts of Delaware and Philadelphia Counties, and appears as follows:

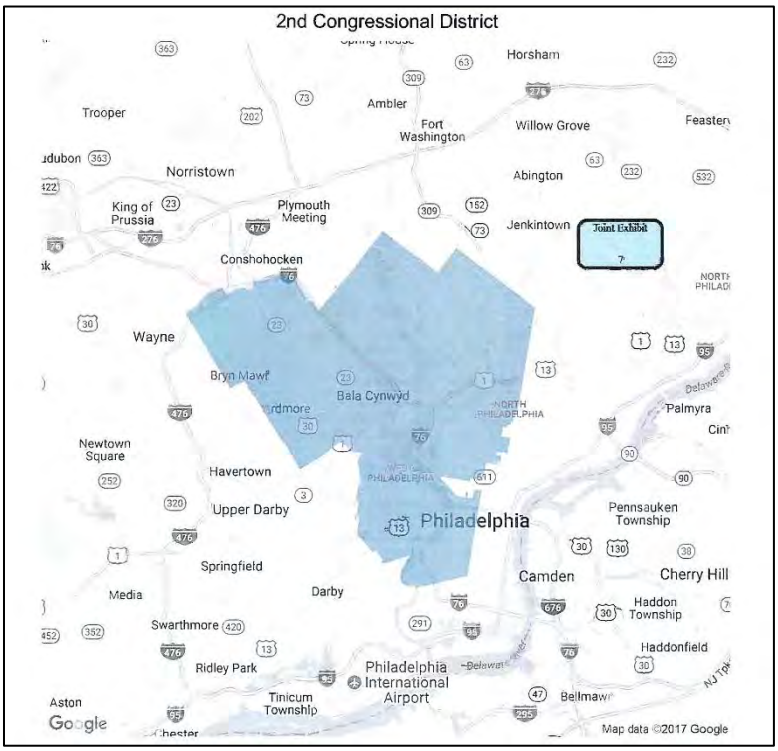


See Joint Exhibit 6.

[15] As with the legislative history of the 2011 Plan, this description is based upon the joint stipulation of the parties.

b. 2nd Congressional District

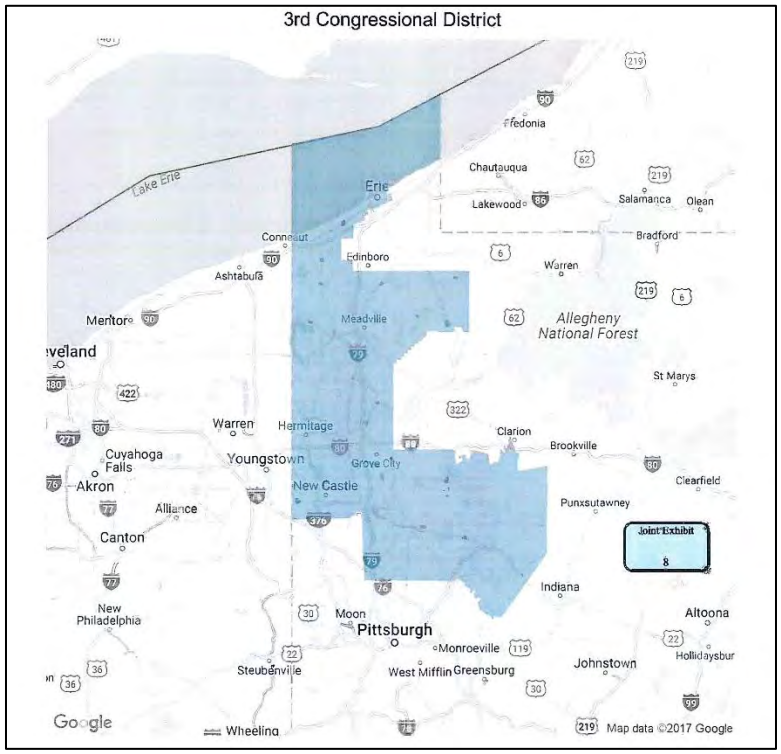
The 2nd Congressional District is composed of parts of Montgomery and Philadelphia Counties, and appears as follows:



See Joint Exhibit 7.

c. 3rd Congressional District

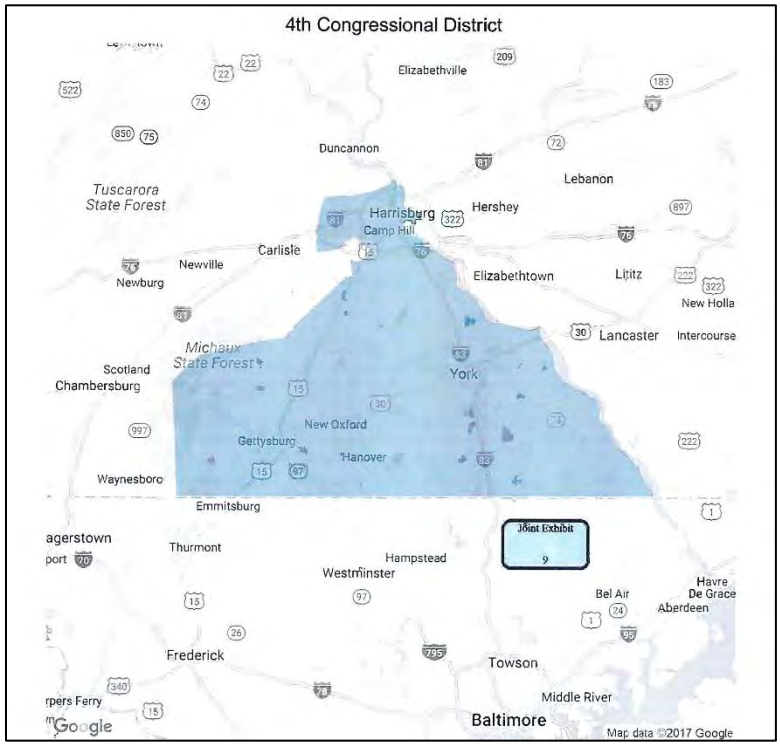
The 3rd Congressional District is composed of Armstrong, Butler, and Mercer Counties, together with parts of Clarion, Crawford, Erie, and Lawrence Counties, and appears as follows:



See Joint Exhibit 8.

d. 4th Congressional District

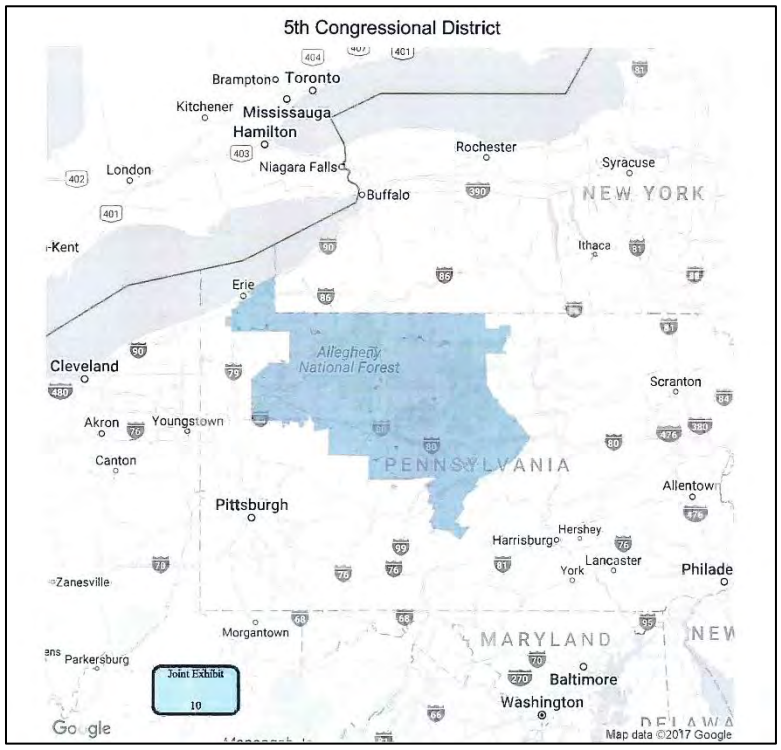
The 4th Congressional District is composed of Adams and York Counties, together with parts of Cumberland and Dauphin Counties, and appears as follows:



See Joint Exhibit 9.

e. 5th Congressional District

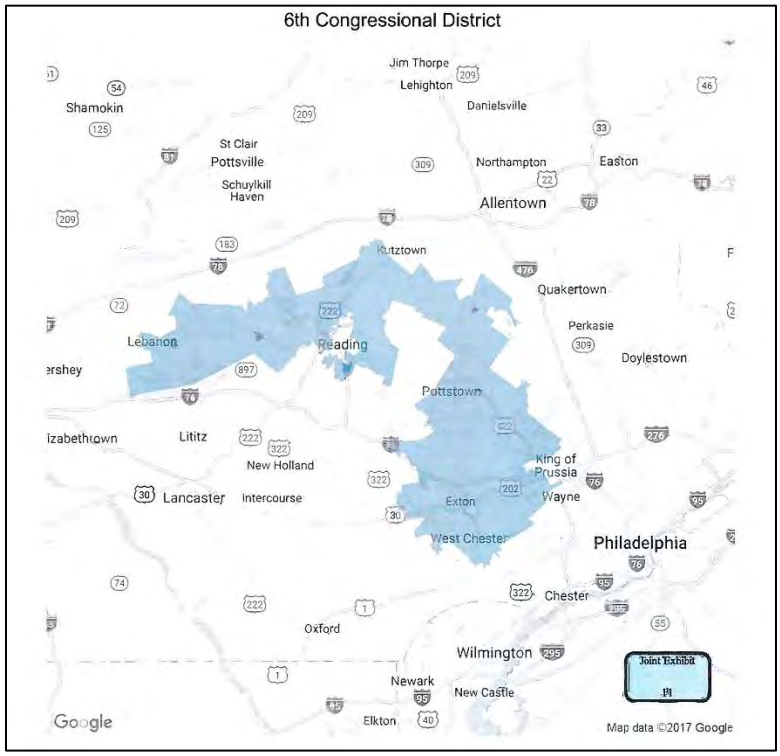
The 5th Congressional District is composed of Cameron, Centre, Clearfield, Clinton, Elk, Forest, Jefferson, McKean, Potter, Venango, and Warren Counties, together with parts of Clarion, Crawford, Erie, Huntingdon, and Tioga Counties, and appears as follows:



See Joint Exhibit 10.

f. 6th Congressional District

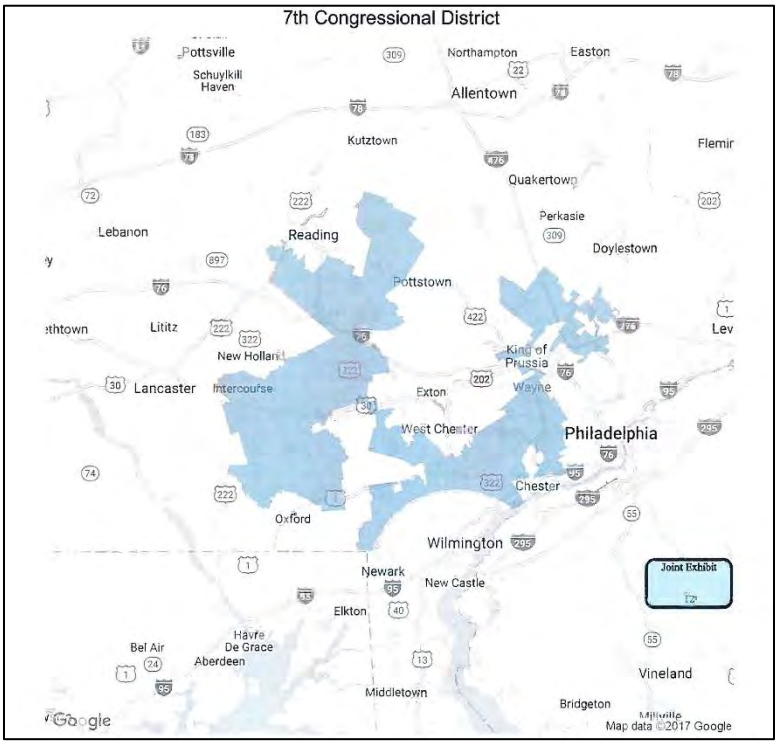
The 6th Congressional District is composed of parts of Berks, Chester, Lebanon, and Montgomery Counties, and appears as follows:



See Joint Exhibit 11.

g. 7th Congressional District

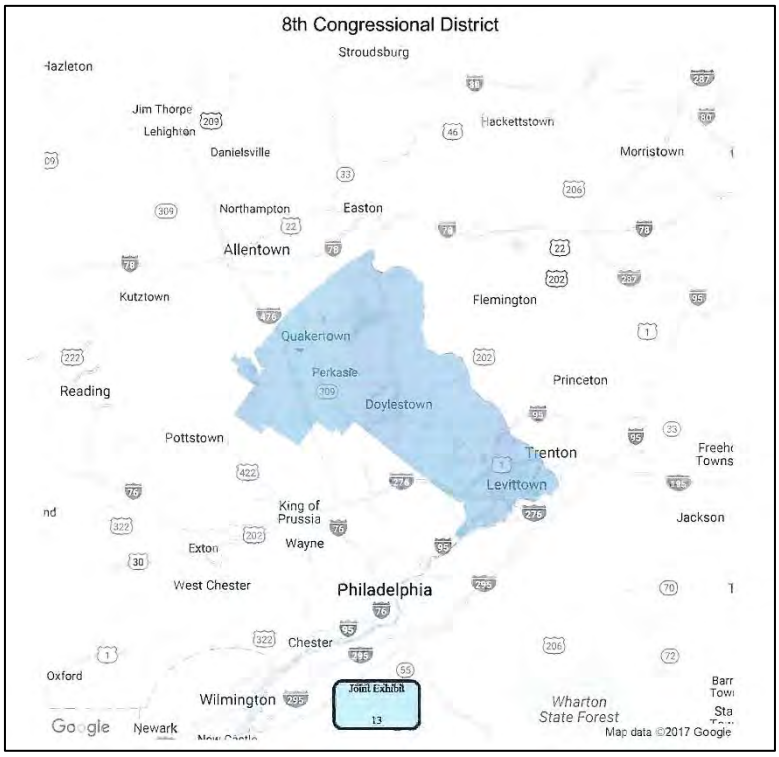
The 7th Congressional District is composed of parts of Berks, Chester, Delaware, Lancaster, and Montgomery Counties, and appears as follows:



See Joint Exhibit 12.

h. 8th Congressional District

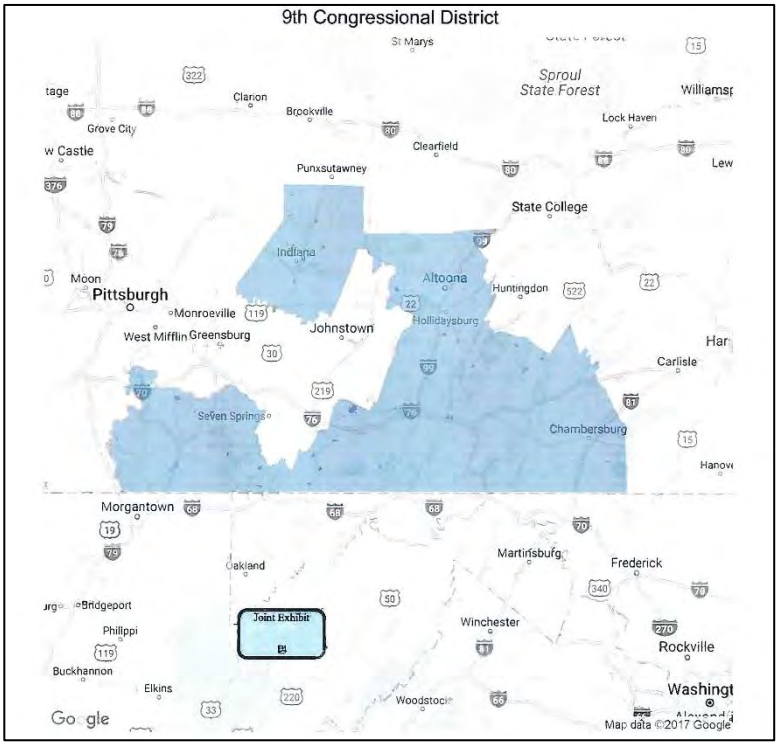
The 8th Congressional District is composed of Bucks County, together with parts of Montgomery County, and appears as follows:



See Joint Exhibit 13.

i. 9th Congressional District

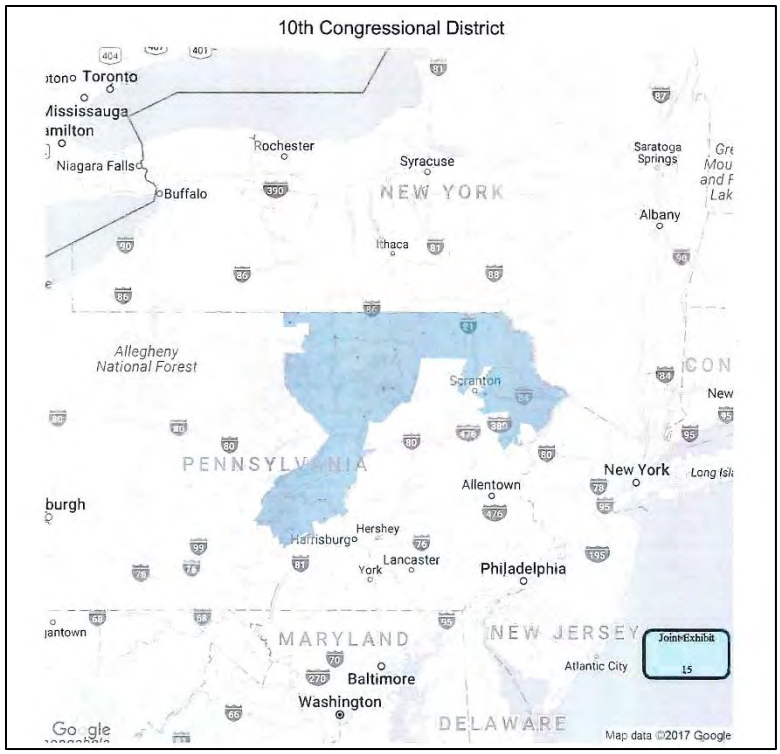
The 9th Congressional District is composed of Bedford, Blair, Fayette, Franklin, Fulton, and Indiana Counties, together with parts of Cambria, Greene, Huntingdon, Somerset, Washington, and Westmoreland Counties, and appears as follows:



See Joint Exhibit 14.

j. 10th Congressional District

The 10th Congressional District is composed of Bradford, Juniata, Lycoming, Mifflin, Pike, Snyder, Sullivan, Susquehanna, Union, and Wayne Counties, together with parts of Lackawanna, Monroe, Northumberland, Perry, and Tioga Counties, and appears as follows:



See Joint Exhibit 15.

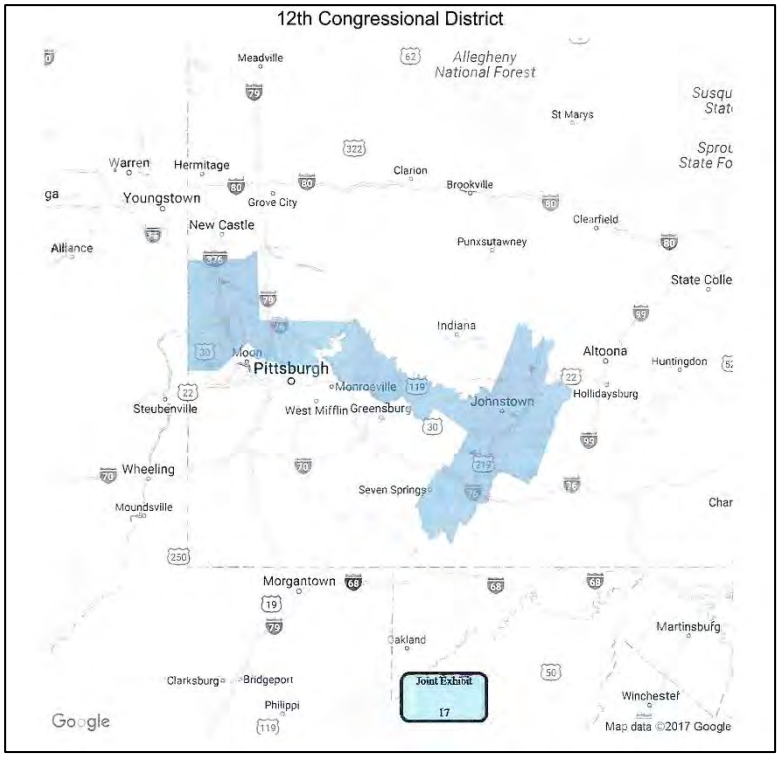
k. 11th Congressional District

The 11th Congressional District is composed of Columbia, Montour, and Wyoming Counties, together with parts of Carbon, Cumberland, Dauphin, Luzerne, Northumberland, and Perry Counties, and appears as follows:

See Joint Exhibit 16.

I. 12th Congressional District

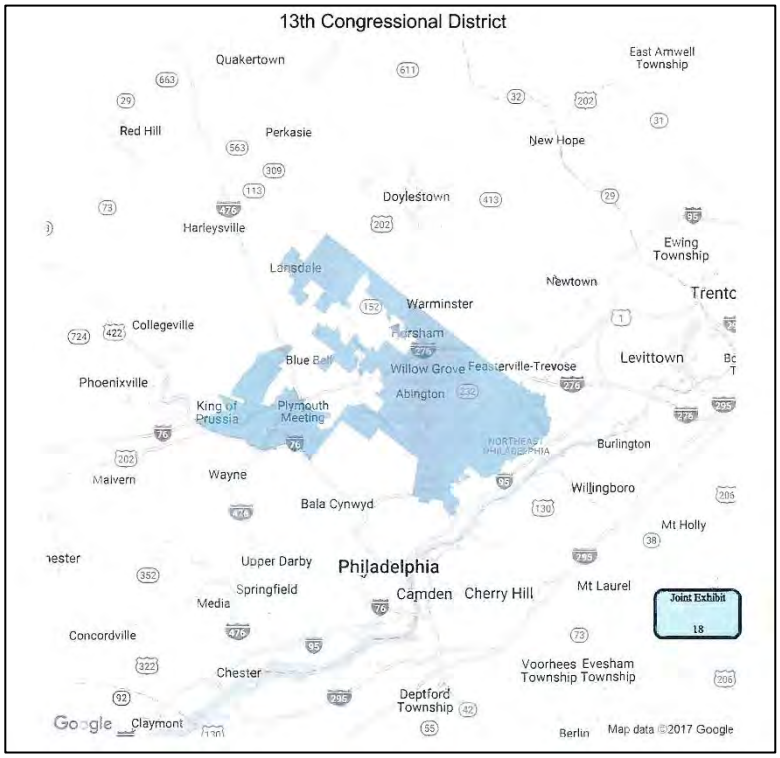
The 12th Congressional District is composed of Beaver County, together with parts of Allegheny, Cambria, Lawrence, Somerset, and Westmoreland Counties, and appears as follows:



See Joint Exhibit 17.

m. 13th Congressional District

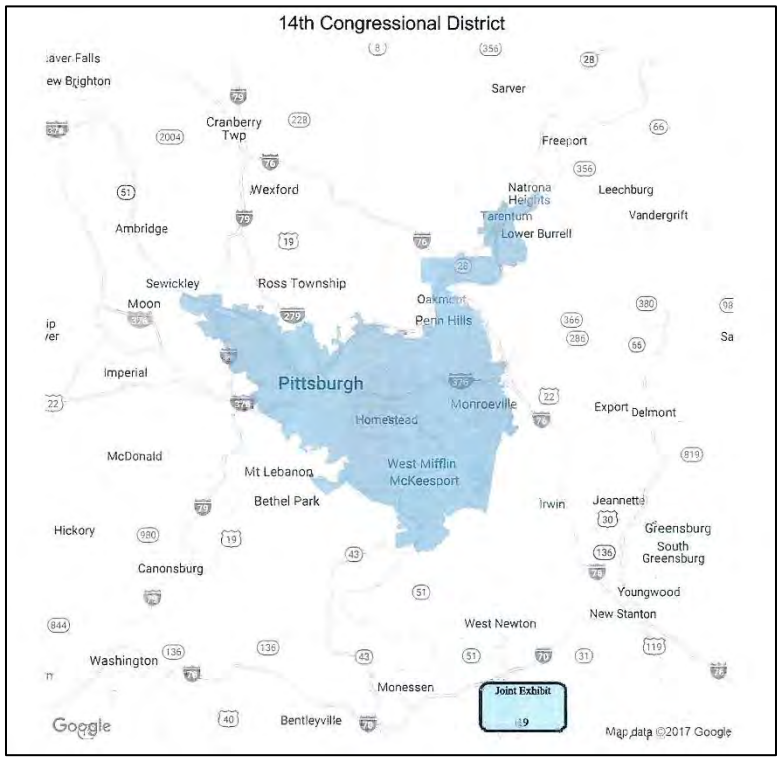
The 13th Congressional District is composed of parts of Montgomery and Philadelphia Counties, and appears as follows:



See Joint Exhibit 18.

n. 14th Congressional District

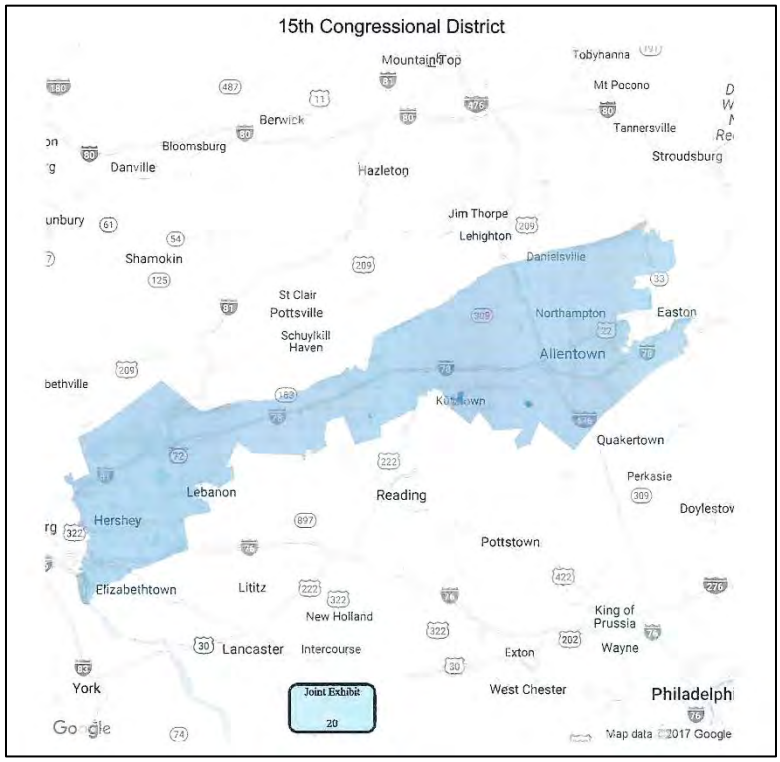
The 14th Congressional District is composed of parts of Allegheny and Westmoreland Counties, and appears as follows:



See Joint Exhibit 19.

o. 15th Congressional District

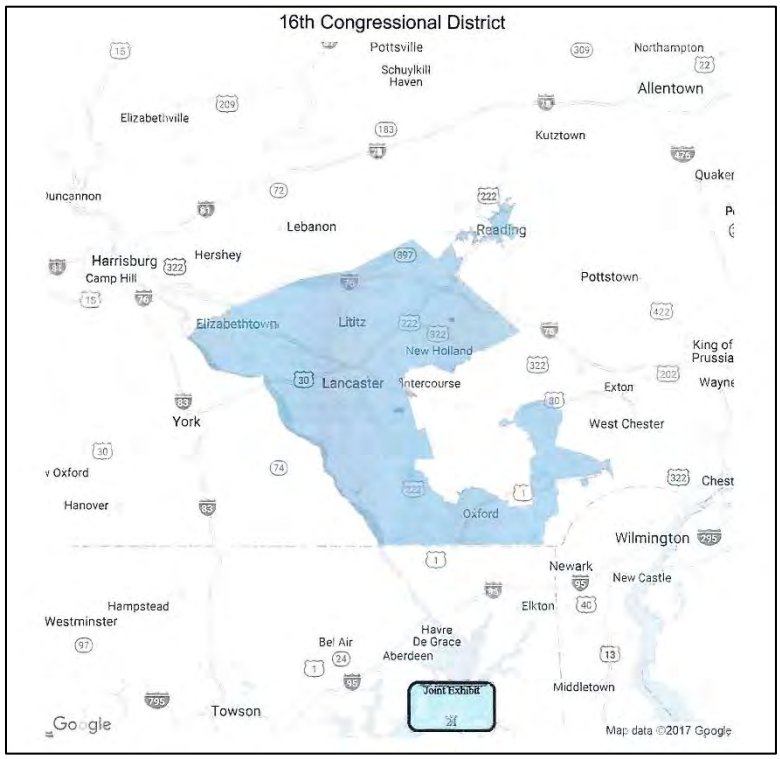
The 15th Congressional District is composed of Lehigh County and parts of Berks, Dauphin, Lebanon, and Northampton Counties, and appears as follows:



See Joint Exhibit 20.

p. 16th Congressional District

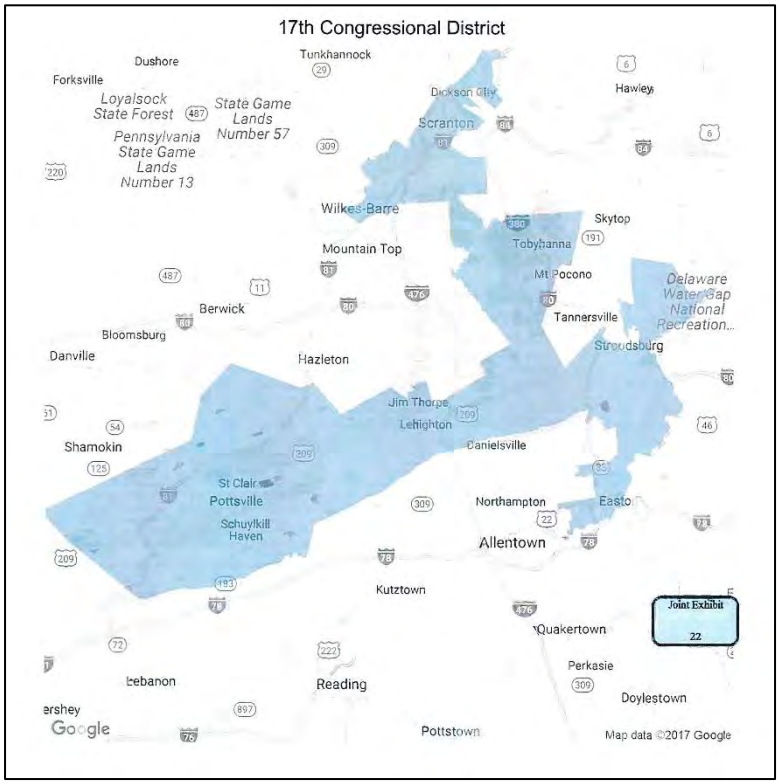
The 16th Congressional District is composed of parts of Berks, Chester, and Lancaster Counties, and appears as follows:



See Joint Exhibit 21.

q. 17th Congressional District

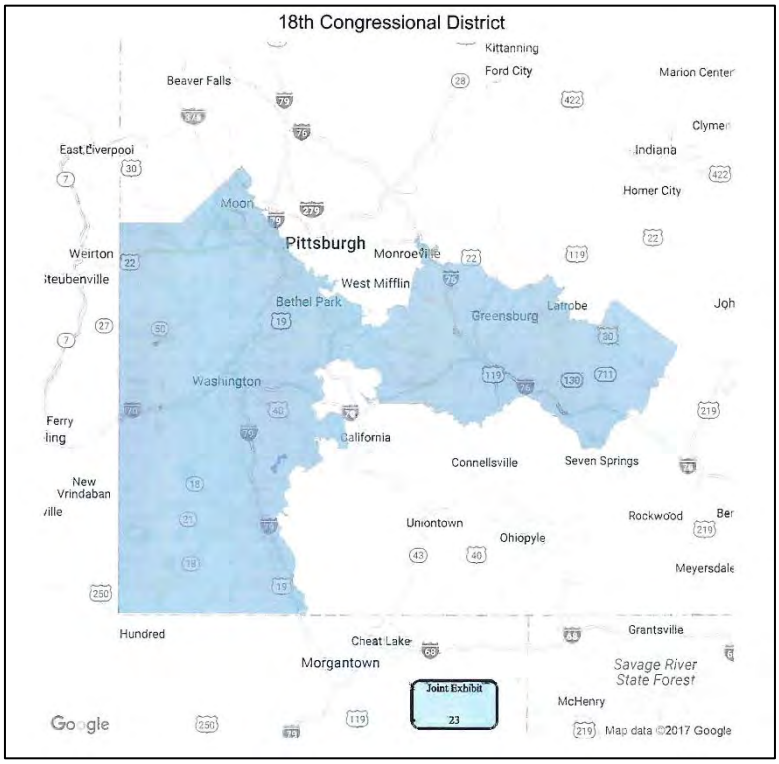
The 17th Congressional District is composed of Schuylkill County and parts of Carbon, Lackawanna, Luzerne, Monroe, and Northampton Counties, and appears as follows:



See Joint Exhibit 22.

r. 18th Congressional District

Finally, the 18th Congressional District is composed of parts of Allegheny, Greene, Washington, and Westmoreland Counties, and appears as follows:



See Joint Exhibit 23.

2. Other Characteristics

Of the 67 counties in Pennsylvania, the 2011 Plan divides a total of 28 counties between at least two different congressional districts:[16] Montgomery County is divided among five congressional districts; Berks and Westmoreland Counties are each divided

[16] The 2011 Plan also consolidates previously split counties: prior to the 2011 Plan, Armstrong, Butler, Mercer, Venango, and Warren Counties were split between congressional districts, whereas, under the 2011 Plan, they are not.

among four congressional districts;[17] Allegheny, Chester,[18] and Philadelphia Counties are each divided among three congressional districts; and Cambria, Carbon, Clarion, Crawford, Cumberland, Delaware, Erie,[19] Greene, Huntingdon, Lackawanna, Lancaster, Lawrence, Lebanon, Luzerne, Monroe, Northampton,[20] Northumberland, Perry, Somerset, Tioga, and Washington Counties are each split between two congressional districts.[21] Additionally, whereas, prior to 1992, no municipalities in Pennsylvania were divided among multiple congressional districts, the 2011 Plan divides 68, or 2.66%, of Pennsylvania's municipalities between at least two Congressional districts.[22]

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[17] The City of Reading is separated from the remainder of Berks County. From at least 1962 to 2002, Berks County was situated entirely within a single congressional district.

[18] The City of Coatesville is separated from the remainder of Chester County.

[19] From at least 1931 until 2011, Erie County was not split between congressional districts.

[20] The City of Easton is separated from the remainder of Northampton County.

[21] In total, 11 of the 18 congressional districts contain more than three counties which are divided among multiple congressional districts.

[22] The municipalities include Archbald, Barr, Bethlehem, Caln, Carbondale, Chester, Cumru, Darby, East Bradford, East Carroll, East Norriton, Fallowfield, Glenolden, Harrisburg, Harrison, Hatfield, Hereford, Horsham, Kennett, Laureldale, Lebanon, Lower Alsace, Lower Gwynedd, Lower Merion, Mechanicsburg, Millcreek, Monroeville, Morgan, Muhlenberg, North Lebanon, Northern Cambria, Olyphant, Penn, Pennsbury, Perkiomen, Philadelphia, Piney, Plainfield, Plymouth Township, Ridley, Riverside, Robinson, Sadsbury, Seven Springs, Shippen, Shippensburg, Shirley, Spring, Springfield, Stroud, Susquehanna, Throop, Tinicum, Trafford, Upper Allen, Upper Darby, Upper Dublin, Upper Gwynedd, Upper Hanover, Upper Merion, Upper Nazareth, West Bradford, West Hanover, West Norriton, Whitehall, Whitemarsh, Whitpain, and Wyomissing. Monroeville, Caln, Cumru, and Spring Township are split into three separate congressional districts. Three of these municipalities – Seven Springs, Shippensburg, and Trafford – are naturally divided between multiple counties, and Cumru is naturally noncontiguous. Additionally, wards in Bethlehem and Harrisburg are split between congressional districts.

Finally, as noted above, the General Assembly was tasked with reducing the number of Pennsylvania's congressional districts from 19 to 18, necessitating the placement of at least two congressional incumbents into the same district. The 2011 Plan placed then-Democratic Congressman for the 12th Congressional District Mark Critz and then-Democratic Congressman for the 4th Congressional District Jason Altmire into the same district. Notably, the two faced off in an ensuing primary election, in which Critz prevailed. He subsequently lost the general election to now-Congressman Keith Rothfus, who has prevailed in each biannual election thereafter.

D. Electoral History

As grounding for the parties' claims and evidentiary presentations, we briefly review the Commonwealth's electoral history before and after the 2011 Plan was enacted.[23] As noted above, the map for the 2011 Plan is attached at Appendix A. The parties have provided copies of prior congressional district maps – for 1943, 1951, 1962, 1972, 1982, 1992, and 2002 – which were procured from the Pennsylvania Manual.[24] They are attached as Joint Exhibit 26 to the Joint Stipulations of Fact. *See* Joint Stipulation of Facts, 12/8/17, at ¶ 93.

[23] As above, this information is derived from the parties' Joint Stipulation of Facts.

[24] The Pennsylvania Manual is a regularly published book issued by the Pennsylvania Department of General Services. We cite it as authoritative. *See, e.g., Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002).

The distribution of seats in Pennsylvania from 1966 to 2010 is shown below:

Year	Districts	Democratic Seats	Republican Seats
1966	27	14	13
1968	27	14	13
1970	27	14	13
1972	25	13	12
1974	25	14	11
1976	25	17	8
1978	25	15	10
1980	25	12[25]	12
1982	23	13	10
1984	23	13	10
1986	23	12	11
1988	23	12	11
1990	23	11	12
1992	21	11	10
1994	21	11	10
1996	21	11	10
1998	21	11	10
2000	21	10	11
2002	19	7	12
2004	19	7	12
2006	19	11	8
2008	19	12	7
2010	19	7	12

[25] One elective representative, Thomas M. Foglietta, was not elected as either a Democrat or Republican in 1980.

Joint Stipulation of Facts, 12/8/17, at ¶ 70.

In the three elections since the 2011 Plan was enacted, Democrats have won the same five districts, and Republicans have won the same 13 districts. In the 2012 election, Democrats won five congressional districts with an average of 76.4% of the vote in each, whereas Republicans won the remaining 13 congressional districts with an average 59.5% of the vote in each, and, notably, Democrats earned a statewide share of 50.8% of the vote, an average of 50.4% per district, with a median of 42.8% of the vote, whereas Republicans earned only a statewide share of 49.2% of the vote.[26]

In the 2014 election, Democratic candidates again won five congressional races, with an average of 73.6% of the vote in each, whereas Republicans again won 13 congressional districts, with an average of 63.4% of the vote in each.[27] In 2014,

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[26] Specifically, in 2012, Democratic candidates won in the 1st Congressional District with 84.9% of the vote; the 2nd Congressional District with 90.5% of the vote; the 13th Congressional District with 69.1% of the vote; the 14th Congressional District with 76.9% of the vote; and the 17th Congressional District with 60.3% of the vote. On the other hand, Republican candidates won in the 3rd Congressional District with 57.2% of the vote; the 4th Congressional District with 63.4% of the vote; the 5th Congressional District with 62.9% of the vote; the 6th Congressional District with 57.1% of the vote; the 7th Congressional District with 59.4% of the vote; the 8th Congressional District with 56.6% of the vote; the 9th Congressional District with 61.7% of the vote; the 10th Congressional District with 65.6% of the vote; the 11th Congressional District with 58.5% of the vote; the 12th Congressional District with 51.7% of the vote; the 15th Congressional District with 56.8% of the vote; the 16th Congressional District with 58.4% of the vote; and the 18th Congressional District with 64.0% of the vote.

[27] Specifically, in 2014, Democrats won in the 1st Congressional District with 82.8% of the vote; the 2nd Congressional district with 87.7% of the vote; the 13th Congressional District with 67.1% of the vote; the 14th Congressional District, which was uncontested, with 100% of the vote; and the 17th Congressional District with 56.8% of the vote. Republican candidates won in the 3rd Congressional District with 60.6% of the vote; the 4th Congressional District with 74.5% of the vote; the 5th Congressional District with 63.6% of the vote; the 6th Congressional district with 56.3% of the vote; the 7th Congressional District with 62.0% of the vote; the 8th Congressional District with 61.9% of the vote; the 9th Congressional District with 63.5% of the vote; the 10th Congressional District with 71.6% of the vote; the 11th Congressional District with 66.3% of the vote; the 12th Congressional District with 59.3% of the vote; the 15th Congressional District, (continued…)

Democrats earned a 44.5% statewide vote share in contested races, whereas Republicans earned a 55.5% statewide vote share in contested races, with a 54.1% statewide share vote in the aggregate.

In the 2016 election, Democrats again won those same five congressional districts, with an average of 75.2% of the vote in each and a statewide vote share of 45.9%, whereas Republicans won those same 13 districts with an average of 61.8% in each and a statewide vote share of 54.1%.[28] [29]

(…continued)
which was uncontested, with 100% of the vote; the 16th Congressional District with 57.7% of the vote; and the 18th Congressional District, which was uncontested, with 100% of the vote.

[28] Specifically, in 2016, Democrats again prevailed in the 1st Congressional District with 82.2% of the vote; the 2nd Congressional District with 90.2% of the vote; the 13th Congressional District, which was uncontested, with 100% of the vote; the 14th Congressional District with 74.4% of the vote; and the 17th Congressional District with 53.8% of the vote. Republicans again prevailed in the remainder of the districts: in the 3rd Congressional district, which was uncontested, with 100% of the vote; in the 4th Congressional District with 66.1% of the vote; in the 5th Congressional District with 67.2% of the vote; in the 6th Congressional District with 67.2% of the vote; in the 7th Congressional District with 59.5% of the vote; in the 8th Congressional District with 54.4% of the vote; in the 9th Congressional District with 63.3% of the vote; in the 10th Congressional District with 70.2% of the vote; in the 11th Congressional District with 63.7% of the vote; in the 12th Congressional District with 61.8% of the vote; in the 15th Congressional District with 60.6% of the vote; in the 16th Congressional District with 55.6% of the vote; and in the 18th Congressional District, which was uncontested, with 100% of the vote.

[29] Notably, voters in the 6th and 7th Congressional Districts reelected Republican congressmen while simultaneously voting for Democratic nominee and former Secretary of State Hillary Clinton for president. Contrariwise, voters in the 17th Congressional District reelected a Democratic congressman while voting for Republican nominee Donald Trump for president. Additionally, several traditionally Democratic counties voted for now-President Trump.

In short, in the last three election cycles, the partisan distribution has been as follows:

Year	Districts	Democratic Seats	Republican Seats	Democratic Vote Percentage	Republic Vote Percentage
2012	18	5	13	50.8%	49.2%
2014	18	5	13	44.5%	55.5%
2016	18	5	13	45.9%	54.1%

Joint Stipulation of Facts, 12/8/18, at ¶ 102.

II. Petitioners' Action

Petitioners filed this lawsuit on June 15, 2017, in the Commonwealth Court. In Count I of their petition for review, Petitioners alleged that the 2011 Plan[30] violates their rights to free expression and association under Article I, Sections 7[31] and 20[32] of the Pennsylvania Constitution. More specifically, Petitioners alleged that the General Assembly created the 2011 Plan by "expressly and deliberately consider[ing] the political views, voting histories, and party affiliations of Petitioners and other Democratic voters" with the intent to burden and disfavor Petitioners' and other Democratic voters'

[30] Petitioners challenged, and before us continue to challenge, the Plan as a whole. Whether such challenges are properly brought statewide, or must be district specific, is an open question. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004). However, no such objection is presented to us.

[31] Article I, Section 7 of the Pennsylvania Constitution provides in relevant part: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Pa. Const. art. I, § 7.

[32] Article I, Section 20 provides: "The citizens have a right in a peaceable manner to assemble together for their common good . . . ." Pa. Const. art. I, § 20.

rights to free expression and association. Petition for Review, 6/15/17, at ¶¶ 105. Petitioners further alleged that the 2011 Plan had the effect of burdening and disfavoring Petitioners' and other Democratic voters' rights to free expression and association because the 2011 Plan "prevented Democratic voters from electing the representatives of their choice and from influencing the legislative process" and suppressed "the political views and expression of Democratic voters." *Id.* at ¶ 107. They contended the Plan "also violates the Pennsylvania Constitution's prohibition against retaliation against individuals who exercise their rights under" these articles. *Id.* at ¶ 108. Specifically, Petitioners alleged that the General Assembly's "cracking" of congressional districts in the 2011 Plan has resulted in their inability "to elect representatives of their choice or to influence the political process." *Id.* at ¶112.

In Count II, Petitioners alleged the Plan violates the equal protection provisions of Article 1, Sections 1 and 26[33] of the Pennsylvania Constitution, and the Free and Equal Elections Clause of Article I, Section 5[34] of the Pennsylvania Constitution. More specifically, Petitioners alleged that the Plan intentionally discriminates against Petitioners and other Democratic voters by using "redistricting to maximize Republican seats in Congress and entrench [those] Republican members in power." *Id.* at ¶ 116. Petitioners further alleged that the Plan has an actual discriminatory effect, because it

[33] Article 1, Section 1, provides: "All 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. Section 26 provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Pa. Const. art. I, § 26.

[34] Article I, Section 5 provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5.

"disadvantages Petitioners and other Democratic voters at the polls and severely burdens their representational rights." *Id.* at ¶ 117. They contended that "computer modeling and statistical tests demonstrate that Democrats receive far fewer congressional seats than they would absent the gerrymander, and that Republicans' advantage is nearly impossible to overcome." *Id.* at ¶ 118. Petitioners claimed that individuals who live in cracked districts under the 2011 Plan are essentially excluded from the political process and have been denied any "realistic opportunity to elect representatives of their choice," and any "meaningful opportunity to influence legislative outcomes." *Id.* at ¶ 119. Finally, Petitioners claimed that, with regard to individuals living in "packed" Democratic districts under the Plan, the weight of their votes has been "substantially diluted," and their votes have no "impact on election outcomes." *Id.* at ¶ 120.

In response to Respondents' application, on October 16, 2017, Judge Dan Pellegrini granted a stay of the Commonwealth Court proceedings pending the United States Supreme Court's decision in *Gill v. Whitford*, No. 16-1161 (U.S. argued Oct. 3, 2017). However, thereafter, Petitioners filed with this Court an application for extraordinary relief, asking that we exercise extraordinary jurisdiction over the matter.[35] On November 9, 2017, we granted the application and assumed plenary jurisdiction over the matter, but, while retaining jurisdiction, remanded the matter to the Commonwealth Court to "conduct all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record on which Petitioners' claims may

[35] *See* 42 Pa.C.S. § 726 ("Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done."); *see also Vaccone v. Syken*, 899 A.2d 1103, 1108 (Pa. 2006).

be decided." Supreme Court Order, 11/9/17, at 2. We ordered the court to do so on an expedited basis, and to submit to us findings of fact and conclusions of law no later than December 31, 2017. *Id.* Finally, we directed that the matter be assigned to a commissioned judge of that court.

The Commonwealth Court, by the Honorable P. Kevin Brobson, responded with commendable speed, thoroughness, and efficiency, conducting a nonjury trial from December 11 through 15, and submitting to us its recommended findings of fact and conclusions of law on December 29, 2017, two days prior to our deadline.[36] Thereafter, we ordered expedited briefing, and held oral argument on January 17, 2018.

III. Commonwealth Court Proceedings

In the proceedings before the Commonwealth Court, that court initially disposed of various pretrial matters. Most notably, the court ruled on Petitioners' discovery requests, and Legislative Respondents' objections thereto, directed to gleaning the legislators' intent behind the passage of the 2011 Plan. By order and opinion dated November 22, 2017, the court concluded that, under the Speech and Debate Clause of the Pennsylvania Constitution,[37] the court "lack[ed] the authority to compel testimony or

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[36] The court's December 29, 2017 Recommended Findings of Fact and Conclusions of Law is broken into two principal, self-explanatory parts. Herein, we refer to those two parts as "Findings of Fact" and "Conclusions of Law."

[37] The Speech and Debate Clause provides:

> The members of the General Assembly shall in all cases, except treason, felony, violation of their oath of office, and breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

Pa. Const. art. II, § 15.

the production of documents relative to the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of" the 2011 Plan, Commonwealth Court Opinion, 11/22/17, at 7, and so quashed those requests.[38]

[38] Petitioners sought discovery from various third parties, including, *inter alia*, the Republican National Committee, the National Republican Congressional Committee, the Republican State Leadership Committee, the State Government Leadership Foundation, and former Governor Corbett, requesting all documents pertaining to the 2011 Plan, all documents pertaining the Redistricting Majority Project (REDMAP), all communications and reports to donors that refer to or discuss the strategy behind REDMAP or evaluate its success, and any training materials on redistricting presented to members, agents, employees, consultants or representatives of the Pennsylvania General Assembly and former Governor Corbett. The discovery request was made for the purpose of establishing the intent of Legislative Respondents to dilute the vote of citizens who historically cast their vote for Democratic candidates. Legislative Respondents opposed the request, asserting, in relevant part, that the information sought was privileged under the Speech and Debate Clause of Article I, Section 15 of the Pennsylvania Constitution. Agreeing with Legislative Respondents, the Commonwealth Court denied the discovery request, excluding any documents that reflected communications with members of the General Assembly or "the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of [the 2011 Plan]," *see* Commonwealth Court Opinion, 11/22/17, at 11-13, and later denied the admission of such information produced in the federal court action.

Given the other unrebutted evidence of the intent to dilute the vote of citizens who historically voted for Democratic candidates, we need not resolve the question of whether our Speech and Debate Clause confers a privilege protecting this information from discovery and use at trial in a case, such as this one, involving a challenge to the constitutionality of a statute. However, we caution against reliance on the Commonwealth Court's ruling. This Court has never interpreted our Speech and Debate Clause as providing anything more than immunity from suit, in certain circumstances, for individual members of the General Assembly. *See, e.g., Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977). Although not bound by decisions interpreting the federal Speech or Debate Clause in Article I, Section 6 of the United States Constitution, *see id.* at 703 n.14, we note that the high Court has recognized an evidentiary privilege only in cases where an individual legislator is facing criminal charges. *See, e.g., United States v. Johnson*, 383 U.S. 169 (1966); *United States v. Helstoski*, 442 U.S. 477 (1979). To date, the United States Supreme Court has never held that an evidentiary privilege exists under the Speech or Debate Clause in lawsuits challenging the constitutionality of a statute. Further, we are not aware of any precedent to support the application of any such privilege to information in the possession of third parties, not legislators.

In addition, Petitioners sought to admit, and Legislative Respondents sought to exclude, certain materials produced by House Speaker Mike Turzai in the federal litigation in *Agre v. Wolf*, *supra*, in response to permitted discovery in that case, along with Petitioners' expert Dr. Jowei Chen's expert reports and testimony based on those materials. (As noted, similar discovery was denied in this case, per the Commonwealth Court's Speech and Debate Clause ruling.) These materials include redistricting maps revealing partisan scoring down to the precinct level, demonstrating that some legislators designing the 2011 Plan relied upon such partisan considerations. Ultimately, the court permitted Dr. Chen's testimony about these materials, but refused to admit the materials themselves, refused to make any findings about them, *see* Findings of Fact at ¶ 307, and submitted a portion to this Court under seal, *see* Petitioners' Exhibit 140. Notably, that sealing order required Petitioners to submit both a "Public" and a "Sealed" version of their brief in order to discuss Exhibit 140.[39] Given our disposition of this matter, we do not further address these materials or the court's evidentiary rulings with respect to them.

In all, the court heard oral argument and ruled on eight motions *in limine.*[40]

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[39] The sole redaction in this regard in the "Public Version" of Petitioners' Brief is on page 8. Thus, the remainder of the citations in this Opinion merely generically refer to "Petitioners' Brief."

[40] The other motions included:

> (1) Petitioners' motion to exclude or limit Intervenors' witness testimony, including precluding the testimony of an existing congressional candidate, limiting the number of witnesses who could testify as Republican Party Chairs to one, and limiting the number of witnesses who could testify as "Republicans at large" to one. The motion was granted. N.T. Trial, 12/11/17, at 94.
>
> (2) Petitioners' motion to exclude testimony from Dr. Wendy K. Tam Cho regarding Dr. Chen. The motion was denied. *Id.* at 95.
>
> (3) Petitioners' motion to exclude the expert testimony of Dr. James Gimpel regarding the intended or actual effect of the 2011 Plan on Pennsylvania's

(continued…)

A. Findings of Fact of the Commonwealth Court

Prior to the introduction of testimony, the parties and Intervenors stipulated to certain background facts, much of which we have discussed above, and to the introduction of certain portions of deposition and/or prior trial testimony as exhibits.[41]

1. Voter Testimony

(…continued)

communities of interest. Legislative Respondents subsequently agreed to withdraw the challenged portion of the Dr. Gimpel's report. *Id.* at 95-96.

(4) Legislative Respondents' motion to exclude documents and testimony regarding REDMAP. The motion was denied. *Id.* at 96.

[41] Petitioners introduced designated excerpts from the depositions of: Carmen Febo San Miguel, Petitioners' Exhibit 163; Donald Lancaster, Petitioners' Exhibit 164; Gretchen Brandt, Petitioners' Exhibit 165; John Capowski, Petitioners' Exhibit 166; Jordi Comas, Petitioners' Exhibit 167; John Greiner, Petitioners' Exhibit 168; James Solomon, Petitioners' Exhibit 169; Lisa Isaacs, Petitioners' Exhibit 170; Lorraine Petrosky; Petitioners' Exhibit 171; Mark Lichty, Petitioners' Exhibit 172; Priscilla McNulty, Petitioners' Exhibit 173; Richard Mantell, Petitioners' Exhibit 174; Robert McKinstry, Jr., Petitioners' Exhibit 175; Robert Smith, Petitioners' Exhibit 176; and Thomas Ulrich, Petitioners' Exhibit 177. Generally, the testimony of the aforementioned Petitioners demonstrates a belief that the 2011 Plan has negatively affected their ability to influence the political process and/or elect a candidate who represents their interests. *See* Findings of Fact at ¶¶ 221-34. Petitioners also introduced excerpts from the trial testimony of State Senator Andrew E. Dinniman in *Agre v. Wolf*, Petitioners' Exhibit 178, and excerpts from the deposition testimony of State Representative Gregory Vitali, Petitioners' Exhibit 179. Senator Dinniman and Representative Vitali both testified as to the circumstances surrounding the enactment of the 2011 Plan.

Respondents introduced affidavits from Lieutenant Governor Stack and Commissioner Marks. Lieutenant Governor Stack's affidavit stated, *inter alia*, that "it is beneficial, when possible, to keep individual counties and municipalities together in a single congressional district." Affidavit of Lieutenant Governor Stack, 12/14/17, at 3, ¶ 8, Respondents' Exhibit 11. Commissioner Marks' affidavit addressed the ramifications with respect to timing in the event a new plan be ordered. Affidavit of Commissioner Marks, 12/14/17, Respondents' Exhibit 2. Intervenors introduced affidavits from Thomas Whitehead and Carol Lynne Ryan, both of whom expressed concern that granting Petitioners relief would adversely affect their political activities. *See* Intervenors' Exhibits 16 and 17.

Initially, several Petitioners testified at trial. They testified as to their belief that, under the 2011 Plan, their ability to elect a candidate who represents their interests and point of view has been compromised. William Marx, a resident of Delmont in Westmoreland County, testified that he is a registered Democrat, and that, under the 2011 Plan, he lives in the 12th Congressional District, which is represented by Congressman Keith Rothfus, a Republican. Marx testified that Congressman Rothfus does not represent his views on, *inter alia*, taxes, healthcare, the environment, and legislation regarding violence against women, and he stated that he has been unable to communicate with him. Marx believes that the 2011 Plan precludes the possibility of having a Democrat elected in his district. N.T. Trial, 12/11/17, at 113-14.

Another Petitioner, Mary Elizabeth Lawn, testified that she is a Democrat who lives in the city of Chester. Under the 2011 Plan, Chester is in the 7th Congressional District, which is represented by Congressman Patrick Meehan, a Republican.[42] *Id.* at 134, 137-39. According to Lawn, Chester is a "heavily African-American" city, and, prior to the enactment of the 2011 Plan, was a part of the 1st Congressional District, which is represented by Congressman Bob Brady, a Democrat.[43] *Id.* at 135, 138-39. According to Lawn, since the enactment of the 2011 Plan, she has voted for the Democratic candidate in three state elections, and her candidate did not win any of the elections. *Id.* at 140. Lawn believes that the 2011 Plan has affected her ability to participate in the

[42] Reportedly, Congressman Meehan will not seek reelection in 2018. Mike DeBonis and Robert Costa, *Rep. Patrick Meehan, Under Misconduct Cloud, Will Not Seek Reelection*, Wash. Post, Jan. 25, 2018 *available at* https://www.washingtonpost.com/news/powerpost/wp/2018/01/25/rep-patrick-meehan-under-misconduct-cloud-will-not-seek-reelection/?utm_term=.9216491ff846.

[43] Reportedly, Congressman Brady also will not seek reelection in 2018. Daniella Diaz, *Democratic Rep. Bob Brady is Not Running for Re-election*, CNN Politics, Jan. 31, 2018, *available at* https://www.cnn.com/2018/01/31/politics/bob-brady-retiring-from-congress-pennsylvania-democrat/index.html.

political process because she was placed in a largely Republican district where the Democratic candidate "doesn't really have a chance." *Id.* Like Marx, Lawn testified that her congressman does not represent her views on many issues, and that she found her exchanges with his office unsatisfying. *Id.* at 140-44.

Finally, Thomas Rentschler, a resident of Exeter Township, testified that he is a registered Democrat. N.T. Trial, 12/12/17, at 669. Rentschler testified that he lives two miles from the City of Reading, and that he has a clear "community of interest" in that city. *Id.* at 682. Under the 2011 Plan, however, Reading is in the 16th Congressional District, and Rentschler is in the 6th Congressional District, which is represented by Congressman Ryan Costello, a Republican. *Id.* at 670-71, 677. Rentschler testified that, while he voted for the Democratic candidate in the last three state elections, all three contests were won by the Republican candidate. *Id.* at 673. In Rentschler's view, the 2011 Plan "has unfairly eliminated [his] chance of getting to vote and actually elect a Democratic candidate just by the shape and the design of the district." *Id.* at 674.

2. Expert Testimony

Petitioners presented the testimony of four expert witnesses, and the Legislative Respondents sought to rebut this testimony through two experts of their own. We address this testimony *seriatim*.

Dr. Jowei Chen

Petitioners presented the testimony of Dr. Jowei Chen, an expert in the areas of redistricting and political geography who holds research positions at the University of Michigan, Stanford University, and Willamette University.[44] Dr. Chen testified that he evaluated the 2011 Plan, focusing on three specific questions: (1) whether partisan

[44] None of the experts presented to the Commonwealth Court were objected to based upon their qualifications as an expert in their respective fields.

intent was the predominant factor in the drawing of the Plan; (2) if so, what was the effect of the Plan on the number of congressional Democrats and Republicans elected from Pennsylvania; and (3) the effect of the Plan on the ability of the 18 individual Petitioners to elect a Democrat or Republican candidate for congress from their respective districts. N.T. Trial, 12/11/17, at 165.

In order to evaluate the 2011 plan, Dr. Chen testified that he used a computer algorithm to create two sets, each with 500 plans, of computer-simulated redistricting plans for Pennsylvania's congressional districts. *Id.* at 170. The computer algorithm used to create the first set of simulated plans ("Simulation Set 1") utilized traditional Pennsylvania districting criteria, specifically: population equality; contiguity; compactness; absence of splits within municipalities, unless necessary; and absence of splits within counties, unless necessary. *Id.* at 167. The computer algorithm used to create the second set of simulated plans ("Simulation Set 2") utilized the aforementioned criteria, but incorporated the additional criteria of protecting 17 incumbents,[45] which, according to Dr. Chen, is not a "traditional districting criterion." *Id.* at 206. Dr. Chen testified that the purpose of adding incumbent protection to the criteria for the second set of computer-simulated plans was to determine whether "a hypothetical goal by the General Assembly of protecting incumbents in a nonpartisan manner might somehow explain or account for the extreme partisan bias" of the 2011 Plan. *Id.*

With regard to Simulation Set 1, the set of computer-simulated plans utilizing only traditional districting criteria, Dr. Chen noted that one of those plans, specifically, "Chen

[45] Dr. Chen noted that there were 19 incumbents in the November 2012 congressional elections, but that, as discussed, Pennsylvania lost one congressional district following the 2010 census. N.T. Trial, 12/11/17, at 207-08.

Figure 1: Example of a Simulated Districting Plan from Simulation Set 1 (Adhering to Traditional Districting Criteria)" (hereinafter "Simulated Plan 1"), which was introduced as Petitioners' Exhibit 3, results in only 14 counties being split into multiple congressional districts, as compared to the 28 counties that are split into multiple districts under the 2011 Plan. *Id.* at 173-74. Indeed, referring to a chart titled "Chen Figure 3: Simulation Set 1: 500 Simulated Plans Following Only Traditional Districting Criteria (No Consideration of Incumbent Protection)," which was introduced as Petitioners' Exhibit 4, Dr. Chen explained that the maximum number of split counties in any of the 500 Simulation Set 1 plans is 16, and, in several instances, is as few as 11. *Id.* at 179. The vast majority of the Simulation Set 1 plans have 12 to 14 split counties. *Id.*

With respect to splits between municipalities, Dr. Chen observed that, under the 2011 Plan, there are 68 splits, whereas the range of splits under the Simulation Set 1 plans is 40 to 58. *Id.* at 180; Petitioners' Exhibit 4. Based on the data contained in Petitioners' Exhibit 4, Dr. Chen noted that the 2011 Plan "splits significantly more municipalities than would have resulted from the simulated plans following traditional districting criteria, and [it] also split significantly more counties." N.T. Trial, 12/11/17, at 180. He concluded that the evidence demonstrates that the 2011 Plan "significantly subordinated the traditional districting criteria of avoiding county splits and avoiding municipal splits. It shows us that the [2011 Plan] split far more counties, as well as more municipalities, than the sorts of plans that would have arisen under a districting process following traditional districting principles in Pennsylvania." *Id.* at 181.

In terms of geographic compactness, Dr. Chen explained that he compared Simulated Plan 1 to the 2011 Plan utilizing two separate and widely-accepted standards. First, Dr. Chen calculated the Reock Compactness Score, which is a ratio of

a particular district's area to the area of the smallest bounding circle that can be drawn to completely contain the district – the higher the score, the more compact the district. *Id.* at 175. The range of Reock Compactness Scores for the congressional districts in Simulated Set 1 was "about .38 to about .46," *id.* at 182, and Simulated Plan 1 had an average Reock Compactness Score range of .442, as compared to the 2011 Plan's score of .278, revealing that, according to Dr. Chen, the 2011 Plan "is significantly less compact" than Simulated Plan 1. *Id.* at 175.

Dr. Chen also calculated the Popper-Polsby Compactness Score of both plans. The Popper-Polsby Compactness Score is calculated by first measuring each district's perimeter and comparing it to the area of a hypothetical circle with that same perimeter. The ratio of the particular district's area to the area of the hypothetical circle is its Popper-Polsby Compactness Score – the higher the score, the greater the geographic compactness. *Id.* at 176-77. The range of Popper-Polsby Compactness Scores for congressional districts in the Simulated Set 1 plans was "about .29 up to about .35," *id.* at 183, and Simulated Plan 1 had an average Popper-Polsby Score of .310, as compared to the 2011 Plan's score of .164, again leading Dr. Chen to conclude that "the enacted map is significantly far less geographically compact" than Simulated Plan 1. *Id.* at 177.

Utilizing a chart showing the mean Popper-Polsby Compactness Score and the mean Reock Compactness Score for each of the 500 Simulation Set 1 plans, as compared to the 2011 Plan, *see* Petitioners' Exhibit 5 ("Chen Figure 4: Simulation Set 1: 500 Simulated Plans Following Only Traditional Districting Criteria (No Consideration of Incumbent Protection)"), Dr. Chen opined that "no matter which measure of compactness you use, it's very clear that the [2011 Plan] significantly and completely sacrifice[s] the traditional districting principle of geographic compactness compared to

the sorts of plans that would have emerged under traditional districting principles." N.T. Trial, 12/11/17, at 184.

Dr. Chen next addressed the 500 Simulation Set 2 Plans, which, as noted above, included the additional criteria of protecting the 17 incumbents. Dr. Chen stated that, in establishing the additional criteria, no consideration was given to the identities or party affiliations of the incumbents. *Id.* at 208. One of the Simulation Set 2 plans, "Chen Figure 1A: Example of a Simulated Districting Plan from Simulation Set 2 (Adhering to Traditional Districting Criteria And Protecting 17 Incumbents)" (hereinafter "Simulated Plan 1A"), which was introduced as Petitioners' Exhibit 7, resulted in only 15 counties being split into multiple congressional districts, as compared to the 28 counties that are split into multiple districts under the 2011 Plan. *Id.* at 213. Referring to Petitioners' Exhibit 8, titled "Chen Figure 6: Simulation Set 2: 500 Simulated Plans Following Traditional Districting Criteria and Protecting 17 Incumbents," Dr. Chen further observed that the 2011 Plan split more municipalities (68) than any of the Simulated Set 2 plans, which resulted in a range of splits between 50 and 66. Based on this data, Dr. Chen opined:

> We're able to conclude from [Petitioners' Exhibit 8] that the [2011 Plan] subordinate[s] the traditional districting criteria of avoiding county splits and avoiding municipal splits and the subordination of those criteria was not somehow justified or explained or warranted by an effort to protect 17 incumbents in an nonpartisan manner. To put that in layman's terms, an effort to protect incumbents would not have justified splitting up as many counties and as many municipalities as we saw split up in the [2011 Plan].

Id. at 217.

With respect to geographic compactness, Dr. Chen explained that Simulated Plan 1A had an average Reock Compactness Score of .396, as compared to the 2011 Plan's score of .278, and Simulated Plan 1A had a Popper-Polsby Compactness Score

of .273, as compared to the 2011 Plan's score of .164. *Id.* at 214; Petitioners' Exhibit 7. Based on an illustration of the mean Popper-Polsby Compactness Score and the mean Reock Compactness Score for each of the 500 Simulation Set 2 plans, as compared to the 2011 Plan, *see* Petitioners' Exhibit 9 ("Chen Figure 7: Simulation Set 2: 500 Simulated Plans Following Traditional Districting Criteria and Protecting 17 Incumbents"), Dr. Chen concluded that the 2011 Plan "significantly subordinated [the] traditional districting criteria of geographic compactness and that subordination of geographic compactness of districts was not somehow justified or necessitated or explained by a hypothetical effort to protect 17 incumbents." N.T. Trial, 12/11/17, at 220.

Dr. Chen also testified regarding the partisan breakdown of the 2011 Plan. Dr. Chen explained that he requested and obtained from the Department of State the actual election data for each voting precinct in Pennsylvania for the six 2008 and 2010 statewide elections. *Id.* at 185-86. Those elections included the elections for the President, Attorney General, Auditor General, and State Treasurer in 2008, and the United States Senate election and the state gubernatorial election in 2010. *Id.* at 187. The election data obtained by Dr. Chen indicated how many votes were cast for each party candidate. *Id.* at 189. By overlaying the precinct-level election results on top of the geographic boundaries as shown on a particular map, he was able to determine whether a particular district had more Republican or Democratic votes during the elections. *Id.* at 196-97. Those districts that had more Republican votes would, naturally, be classified as Republican.

Dr. Chen observed that, under the 2011 Plan, 13 of the 18 congressional districts are classified as Republican. *Id.* at 198. However, when Dr. Chen overlaid the precinct-level election results on Simulated Plan 1, only 9 of the 18 congressional

districts would be classified as Republican. *Id.* at 197. Indeed, in the 500 Simulation Set 1 plans, the highest number of classified Republican districts was 10, and in none of the simulated plans would 13 of the congressional districts be classified as Republican. *Id.* at 200. Based on this data, Dr. Chen stated "I'm able to conclude with well-over 99.9 percent statistical certainty that the [2011 Plan's] creation of a 13-5 Republican advantage in Pennsylvania's Congressional delegation is an outcome that would never have emerged from a districting process adhering to and following traditional districting principles." *Id.* at 203-04.

Moreover, Dr. Chen testified that, even under the Simulation Set 2 plans, which took into account preservation of incumbent candidates, none of the 500 plans resulted in a Republican District/Democratic District ratio of more than 10 to 8. *Id.* at 221-22; Petitioners' Exhibit 10. Based on a comparison of the 2011 Plan and his simulated redistricting plans, Dr. Chen determined that "partisan intent predominated the drawing of the [2011 Plan] . . . and the [2011 Plan] was drawn with a partisan intent to create a 13-5 Republican advantage and that this partisan intent subordinated traditional districting principles in the drawing of the enacted plan." *Id.* at 166.

Dr. Chen was asked to consider whether the partisan breakdown of the 2011 Plan might be the result of a "hypothetical effort to produce a certain racial threshold of having one district of over a 56.8 percent African-American voting-age population." *Id.* at 245.[46] To answer this question, Dr. Chen explained that he analyzed the 259 computer-simulated plans from Simulation Sets 1 and 2 that included a congressional voting district with an African-American voting age population of at least 56.8%. Dr.

[46] Under the 2011 Plan, the only congressional district with an African-American voting-age population of more than 50% is the 2nd Congressional District, which includes areas of Philadelphia; the African-American voting-age population for that district is 56.8%. N.T. Trial, 12/11/17, at 239.

Chen testified that, of those 259 simulated plans, *none* resulted in a Republican-Democrat congressional district ratio of 13 to 5. *Id.* at 244-45, 250. Indeed, of the Simulated Set 1 plans, which did not take into account protection of incumbents, the maximum ratio was 9 to 9, and of the Simulated Set 2 plans, which did protect incumbents, the maximum ratio was 11 to 8, and, in one case, was as low as 8 to 11. *Id.*; Petitioners' Exhibit 15 ("Chen Figure 10"). Dr. Chen concluded "the 13-5 Republican advantage of the enacted map is an outcome that is not plausible, even if one is only interested in plans that create one district with over 56.8 percent African-American voting-age population." N.T. Trial, 12/11/17, at 245.

Dr. Chen also was asked whether the 13-5 Republican advantage in the 2011 Plan could be explained by political geography – that is, the geographic patterns of political behavior. *Id.* at 251. Dr. Chen explained that political geography can create natural advantages for one party over another; for example, he observed that, in Florida, Democratic voters are often "far more geographically clustered in urban areas," whereas Republicans "are much more geographically spaced out in rural parts" of the state, resulting in a Republican advantage in control over districts and seats in the state legislature. *Id.* at 252-53.

In considering the impact of Pennsylvania's political geography on the 2011 Plan, Dr. Chen explained that he measured the partisan bias of the 2011 Plan by utilizing a common scientific measurement referred to as the mean-median gap. *Id.* at 257. To calculate the mean, one looks at the average vote share per party in a particular district. *Id.* To calculate the median, one "line[s] up" the districts from the lowest to the highest vote share; the "middle best district" is the median. *Id.* at 258. The median district is the district that either party has to win in order to win the election. *Id.* Dr. Chen testified that, under the 2011 Plan, the Republican Party has a mean vote share of 47.5%, and a

median vote share of 53.4%. *Id.* at 261; Petitioners' Exhibit 1, at 20. This results in a mean-median gap of 5.9%, which, according to Dr. Chen, indicates that, under the 2011 Plan, "Republican votes . . . are spread out in a very advantageous manner so as to allow -- in a way that would allow the Republicans to more easily win that median district." N.T. Trial, 12/11/17, at 259. The converse of this mean-median gap result is that Democratic voters "are very packed into a minority of the districts, which they win by probably more comfortable margins," which makes it "much harder for Democrats under that scenario to be able to win the median district. So, in effect, what that means is it's much harder for the Democrats to be able to win a majority of the Congressional delegation." *Id.* at 260.

Dr. Chen recognized that "Republicans clearly enjoy a small natural geographic advantage in Pennsylvania because of the way that Democratic voters are clustered and Republican voters are a bit more spread out across different geographies of Pennsylvania." *Id.* at 255. However, Dr. Chen observed that the range of mean/median gaps created in any of the Simulated Set 1 plans was between "a little over 0 percent to the vast majority of them being under 3 percent," with a maximum of 4 percent. *Id.* at 262-63; Petitioners' Exhibit 16 ("Chen Figure 5"). Dr. Chen explained that this is a "normal range," and that a 6% gap "is a very statistically extreme outcome that cannot be explained by voter geography or by traditional districting principles alone." N.T. Trial, 12/11/17, at 263-64. Dr. Chen noted that the range of mean/median gaps created by any of the Simulated Set 2 plans also did not approach 6%, and, thus, that the 2011 Plan's "extreme partisan skew of voters is not an outcome that naturally emerges from Pennsylvania's voter geography combined with traditional districting principles and an effort to protect 17 incumbents in a nonpartisan manner. It's not a plausible outcome given those conditions." *Id.* at 266; Petitioners' Exhibit 17 ("Chen Figure 9").

In sum, Dr. Chen "statistically conclude[d] with extremely high certainty . . . that, certainly, there is a small geographic advantage for the Republicans, but it does not come close to explaining the extreme 13-5 Republican advantage in the [2011 Plan]." N.T. Trial, 12/11/17, at 255-56.

Ultimately, the Commonwealth Court found Dr. Chen's testimony credible; specifically, the court held that Dr. Chen's testimony "established that the General Assembly included factors other than nonpartisan traditional districting criteria in creating the 2011 Plan in order to increase the number of Republican-leaning congressional voting districts." Findings of Fact at ¶ 309. The court noted, however, that Dr. Chen's testimony "failed to take into account the communities of interest when creating districting plans," and "failed to account for the fact that courts have held that a legislature may engage in some level of partisan intent when creating redistricting plans." *Id.* at ¶¶ 310, 311.

Dr. John Kennedy

Petitioners next presented the testimony of Dr. John Kennedy, an expert in the area of political science, specializing in the political geography and political history of Pennsylvania, who is a professor of political science at West Chester University. Dr. Kennedy testified that he analyzed the 2011 Plan "to see how it treated communities of interest, whether there were anomalies present, whether there are strangely designed districts, whether there are things that just don't make sense, whether there are tentacles, whether there are isthmuses, whether there are other peculiarities." N.T. Trial, 12/12/17, at 580. Dr. Kennedy also explained several concepts used to create a gerrymandered plan. For example, he described that "cracking" is a method by which a particular party's supporters are separated or divided so they cannot form a larger, cohesive political voice. *Id.* at 586. Conversely, "packing" is a process by which

individual groups who reside in different communities are placed together based on their partisan performance, in an effort to lessen those individuals' impact over a broader area. *Id.* Finally, Dr. Kennedy defined "highjacking" as the combining of two congressional districts, both of which have the majority support of one party – the one not drawing the map – thereby forcing two incumbents to run against one another in the primary election, and automatically eliminating one of them. *Id.* at 634.

When asked specifically about the 2011 Plan, Dr. Kennedy opined that the 2011 Plan "negatively impacts Pennsylvania's communities of interest to an unprecedented degree and contains more anomalies than ever before." *Id.* at 579. For example, Dr. Kennedy noted that Erie County, in the 3rd Congressional District, is split under the 2011 Plan for "no apparent nonpartisan reason," when it had never previously been split. *Id.* at 591. According to Dr. Kennedy, Erie County is a historically Democratic county, and, in splitting the county, the legislature "cracked" it, diluting its impact by pushing the eastern parts of the county into the rural and overwhelmingly Republican 5th Congressional District. *Id.* at 597; *see* Petitioners' Exhibit 73.

Dr. Kennedy next addressed the 7th Congressional District, which he noted "has become famous certainly systemwide, if not nationally, as one of the most gerrymandered districts in the country," earning the nickname "the Goofy kicking Donald district." N.T. Trial, 12/11/17, at 598-99; *see* Joint Exhibit 12. According to Dr. Kennedy, the 7th Congressional District was historically based in southern Delaware County; under the 2011 Plan, it begins in Delaware County, moves north into Montgomery County, then west into Chester County, and finally, both north into Berks County and south into Lancaster County. At one point, along Route 30, the district is contiguous only by virtue of a medical facility, N.T. Trial, 12/11/17, at 600-01; at another point, in King of Prussia, it remains connected by a single steak and seafood restaurant.

Id. at 604. Dr. Kennedy further observed that the 7th Congressional District contains 26 split municipalities. *Id.* at 615.

Dr. Kennedy offered the 1st Congressional District as an example of a district which has been packed. *Id.* at 605; *see* Petitioners' Exhibit 70. He described that the 1st Congressional District begins in Northeast Philadelphia, an overwhelmingly Democratic district, and largely tracks the Delaware River, but occasionally reaches out to incorporate other Democratic communities, such as parts of the city of Chester and the town of Swarthmore. N.T. Trial, 12/11/17, at 605-08.

Dr. Kennedy also discussed the 4th Congressional District, as shown in Petitioners' Exhibit 75, observing that the district is historically "a very Republican district." *Id.* at 631. In moving the northernmost tip of the City of Harrisburg, which is predominantly a Democratic city, to the 4th Congressional District from the district it previously shared with central Pennsylvania and the Harrisburg metro area, which are part of the same community of interest, the 2011 Plan has diluted the Democratic vote in Harrisburg. *Id.* at 631-32.[47]

In sum, Dr. Kennedy concluded that the 2011 Plan "gives precedence to political considerations over considerations of communities of interest and disadvantages Democratic voters, as compared to Republican voters. This is a gerrymandered map." *Id.* at 644. The Commonwealth Court found Dr. Kennedy's testimony credible. However, it concluded that Dr. Kennedy "did not address the intent behind the 2011 Plan," and it specifically "disregarded" Dr. Kennedy's opinion that the 2011 Plan was an unconstitutional gerrymander as an opinion on the ultimate question of law in this case. Findings of Fact at ¶¶ 339-41.

[47] Dr. Kennedy's testimony was not limited to discussion of the four specific congressional districts discussed herein.

Dr. Wesley Pegden

Petitioners next presented the testimony of Dr. Wesley Pegden, an expert in the area of mathematical probability, and professor of mathematical sciences at Carnegie Mellon University. Dr. Pegden testified that he evaluated the 2011 Plan to determine whether it "is an outlier with respect to partisan bias and, if so, if that could be explained by the interaction of political geography and traditional districting criteria in Pennsylvania." N.T. Trial, 12/13/17, at 716-17. In evaluating the 2011 Plan, Dr. Pegden utilized a computer algorithm that starts with a base plan − in this case, the 2011 Plan − and then makes a series of small random changes to the plan. Dr. Pegden was able to incorporate various parameters, such as maintaining 18 contiguous districts, maintaining equal population, and maintaining compactness. *Id.* at 726. Dr. Pegden then noted whether the series of small changes resulted in a decrease in partisan bias, as measured by the mean/median. *Id.* at 722-23.

The algorithm made approximately 1 trillion computer-generated random changes to the 2011 Plan, and, of the resulting plans, Dr. Pegden determined that 99.999999% of them had less partisan bias than the 2011 Plan. *Id.* at 749; Petitioners' Exhibit 117, at 1. Based on this data, Dr. Pegden concluded the General Assembly "carefully crafted [the 2011 Plan] to ensure a Republican advantage." Petitioners' Exhibit 117, at 1. He further testified the 2011 Plan "was indeed an extreme outlier with respect to partisan bias in a way that could not be explained by the interaction of political geography and the districting criteria" that he considered. N.T. Trial, 12/13/17, at 717.

The Court found Dr. Pegden's testimony to be credible; however, it noted that, like Dr. Chen's testimony, his testimony did not take into account "other districting considerations, such as not splitting municipalities, communities of interest, and some

permissible level of incumbent protection and partisan intent." Findings of Fact at ¶¶ 360-61. Further, as with Dr. Kennedy, the Commonwealth Court "disregarded" Dr. Pegden's opinion that the 2011 Plan was an unconstitutional gerrymander as an opinion on a question of law. *Id.* at ¶ 363.

Dr. Christopher Warshaw

Petitioners next presented the testimony of Dr. Christopher Warshaw, an expert in the field of American politics – specifically, political representation, public opinion, elections, and polarization – and professor of political science at George Washington University. Dr. Warshaw testified that he was asked to evaluate the degree of partisan bias in the 2011 Plan, and to place any such bias into "historical perspective." N.T. Trial, 12/13/17, at 836.

Dr. Warshaw suggested that the degree of partisan bias in a redistricting plan can be measured through the "efficiency gap," which is a formula that measures the number of "wasted" votes for one party against the number of "wasted" votes for another party. *Id.* at 840-41. For a losing party, all of the party's votes are deemed wasted votes. For a winning party, all votes over the 50% needed to win the election, plus one, are deemed wasted votes. The practices of cracking and packing can be used to create wasted votes. *Id.* at 839. He explained that, in a cracked district, the disadvantaged party loses narrowly, wasting a large number of votes without winning a seat; in a packed district, the disadvantaged party wins overwhelmingly, again, wasting a large number of votes. *Id*. at 839-40. To calculate the efficiency gap, Dr. Warshaw calculates the ratio of a party's wasted votes over the total number of votes cast in the election, and subtracts one party's ratio from the ratio for the other party. The larger the number, the greater the partisan bias. For purposes of evaluating the 2011 Plan, Dr. Warshaw explained that an efficiency gap of a negative percentage represents a

Republican advantage, and a positive percentage represents a Democratic advantage. *Id.* at 842. (The decision of which party's gap is deemed negative versus positive – the scale's polarity – is arbitrary. *Id.* at 854.) He summed up the approach as follows:

> The efficiency gap is just a way of translating this intuition that what gerrymandering is ultimately about is efficiently translating votes into seats by wasting as many of your opponent's supporters as possible and as few as possible -- as possible of your own. So it's really just a formula that captures this intuition that that's what gerrymandering is at its core.

Id. at 840.

Dr. Warshaw testified that, historically, in states with more than six congressional districts, the efficiency gap is close to 0%. An efficiency gap of 0% indicates no partisan advantage. *Id.* at 864. He explained that 75% of the time, the efficiency gap is between 10% and negative 10%, and, less than 4% of the time, the efficiency gap is outside the range of 20% and negative 20%. *Id.* at 865.

In analyzing the efficiency gap in Pennsylvania for the years 1972 through 2016, Dr. Warshaw discovered that, during the 1970s, there was "a very modest" Democratic advantage, but that the efficiency gap was relatively close to zero. *Id.* at 870; *see* Petitioner's Exhibit 40. In the 1980s and 90s, the efficiency gap indicated no partisan advantage for either party. *Id.* Beginning in 2000, there was a "very modest Republican advantage," but the efficiency gaps "were never very far from zero." *Id.* at 870-71. However, in 2012, the efficiency gap in Pennsylvania was negative 24%, indicating that "Republicans had a 24-percentage-point advantage in the districting process." *Id.* at 871. In 2014, "Republicans continued to have a large advantage in the districting process with negative 15 percent," and, in 2016, Republicans "continued to have a very large and robust" advantage with an efficiency gap of negative 19%. *Id.*

Dr. Warshaw confirmed that, prior to the 2011 Plan, Pennsylvania never had an efficiency gap of 15% in favor of either party, and only once had there been an efficiency gap of even 10%. *Id.* at 872. Thus, Dr. Warshaw concluded that the efficiency gaps that occurred after the 2011 Plan were "extreme" relative to the prior plans in Pennsylvania. *Id.* Indeed, he noted that the efficiency gap in Pennsylvania in 2012 was the largest in the country for that year, and was the second largest efficiency gap in modern history "since one-person, one-vote went into effect in 1972." *Id.* at 874. The impact of an efficiency gap between 15% and 24%, according to Dr. Warshaw, "implies that Republicans won an average of three to four extra Congressional seats each year over this timespan." *Id.* at 873.

When asked to consider whether geography may have contributed to the large efficiency gap in Pennsylvania, Dr. Warshaw stated, "it's very unlikely that some change in political geography or some other aspect of voting behavior would have driven this change. This change was likely only due to the districts that were put in place." *Id.* at 879. With regard to the change in the efficiency gap between the 2010 and 2012 elections, Dr. Warshaw opined that "there's no possible change in political geography that would lead to such a dramatic shift." *Id.* Dr. Warshaw further concluded that "the efficiency gaps that occured immediately after the 2011 Redistricting Plans went into place are extremely persistent," and are unlikely to be remedied by the "normal electoral process." *Id.* at 890-91.

In addition to his testimony regarding the efficiency gap, Dr. Warshaw discussed the concept of polarization, which he defined as the difference in voting patterns

between Democrats and Republicans in Congress, *id.* at 903, and the impact of partisan gerrymandering on citizens' faith in government. *Id.* at 953.[48]

The Commonwealth Court found Dr. Warshaw's testimony to be credible, particularly with respect to the existence of an efficiency gap in Pennsylvania. Nevertheless, the court opined that the full meaning and effect of the gap "requires some speculation and does not take into account some relevant considerations, such as quality of candidates, incumbency advantage, and voter turnout." Findings of Fact at ¶ 389. The court expressed additional concerns that the efficiency gap "devalues competitive elections," in that even in a district in which both parties have an equal chance of prevailing, a close contest will result in a substantial efficiency gap in favor of the prevailing party. *Id.* at ¶ 390. Finally, the court concluded that Dr. Warshaw's comparison of the efficiency gap in Pennsylvania and other states was of limited value, as it failed to take into consideration whether there were state differences in methods and limitations for drawing congressional districts. *Id.* at 89-90 ¶ 391.[49]

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[48] A detailed explanation of this aspect of his testimony is unnecessary for purposes of this Opinion.

[49] Following the presentation of Dr. Warshaw's testimony, Petitioners requested permission to admit into the record several documents, including: Petitioners' Exhibit 124 (Declaration of Stacie Goede, Republican State Leadership Conference); Petitioners' Exhibit 126 (Redistricting 2010 Preparing for Success); Petitioners' Exhibit 127 (RSLC Announces Redistricting Majority Project (REDMAP); Petitioners' Exhibit 128 (REDistricting MAjority Project); Petitioners' Exhibit 129 (REDMAP Political Report: July 2010); Petitioners' Exhibit 131 (REDMAP 2012 Summary Report); Petitioners' Exhibit 132 (REDMAP Political Report: Final Report); Petitioners' Exhibit 133 (2012 RSLC Year in Review); Petitioners' Exhibit 134 (REDMAP fundraising letter); and Petitioners' Exhibit 140 ("Map-CD18 Maximized"). As noted above, the Commonwealth Court sustained Respondents' objections to the admission of these documents, but admitted them under seal "for the sole purpose of . . . allowing the Supreme Court to revisit my evidentiary ruling if it so chooses." N.T. Trial, 12/13/17, at 1061; *see id.* at 1070. Petitioners also moved for the admission of Exhibits 27, 28, 29, 30, 31, and 33. The court refused to admit Exhibits 27, 28, 29, 30, and 31, and reiterated that it had (continued…)

Dr. Wendy K. Tam Cho

In response to the testimony offered by Petitioners, Legislative Respondents presented the testimony of their own experts, beginning with Wendy K. Tam Cho, Ph.D., a professor at the University of Illinois, who was certified as an expert in the areas of political science with a focus on political geography, redistricting, American elections, operations research, statistics, probability, and high-performance computing; she was called to rebut Dr. Chen's and Dr. Pegden's testimony. N.T. Trial, 12/14/17, at 1132. Dr. Cho opined that, based upon her review of one of Dr. Chen's prior papers, she believed that his methodology was a flawed attempt at a Monte Carlo simulation – *i.e.*, a flawed attempt to use random sampling to establish the probability of outcomes. Specifically, Dr. Cho explained that Dr. Chen's methodology was flawed because, although his algorithm randomly selected an initial voting district from which to compile a redistricting plan, it subsequently followed a determined course in actually compiling it, thereby undermining its ability to establish probabilistic outcomes. *Id.* at 1137-38. Dr. Cho also criticized Dr. Chen's algorithm on, *inter alia*, the basis that it had not been academically validated, *id.* at 1170-73; that many or all of the alternative plans failed to include all legally applicable and/or traditional redistricting principles "as [she] understand[s] them," *id.* at 1176; and that the algorithm generated too small a sample size of alternative plans to establish probabilistic outcomes. *Id.* at 1181-85.

Dr. Cho testified that, based upon her review of Dr. Pegden's published work, she believed his methodology too was flawed, in that it failed to incorporate ordinary

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previously ruled on Exhibit 33 and held it was not admissible. *Id.* at 1077. The court also refused to admit Exhibits 135, 136, 137, 138, 139, and 141-161. *Id.* at 1083.

redistricting criteria such as avoiding municipal splits and protecting incumbents. *Id.* at 1219.

Notably, however, Dr. Cho conceded that she did not actually review either Dr. Chen's or Dr. Pegden's algorithms or codes, *id.* at 1141, 1296, and both Dr. Pegden and Dr. Chen testified on rebuttal that the bulk of Dr. Cho's assumptions regarding their methodology – and, thus, derivatively, her criticisms thereof – were erroneous. *Id.* at 1368-95; N.T. Trial, 12/15/17, at 1650-75. Ultimately, the Commonwealth Court found Dr. Cho's testimony incredible "with regard to her criticisms of the algorithms used by Dr. Chen and Dr. Pegden, but credible with regard to her observation that Dr. Pegden's algorithm failed to avoid municipal splits and did not account for permissible incumbency protection." Findings of Fact at ¶ 398. Nevertheless, the court found Dr. Cho's testimony did not lessen the weight of either Dr. Chen's conclusion that adherence to what he viewed as traditional redistricting criteria could not explain the 2011 Plan's partisan bias, or Dr. Pegden's conclusion that the 2011 Plan is a statistical outlier as compared to maps with nearly identical population equality, contiguity, compactness, and number of county splits. *Id.* at ¶¶ 399-400. The court also concluded that Dr. Cho offered no meaningful guidance as to an appropriate test for determining the existence of an unconstitutional partisan gerrymander. *Id.* at ¶ 401.

Dr. Nolan McCarty

Respondents also presented the testimony of Dr. Nolan McCarty, an expert in the area of redistricting, quantitative election and political analysis, representation and legislative behavior, and voting behavior, and professor of politics and public affairs at Princeton University. Dr. McCarty was asked to comment on the expert reports of Dr. Chen and Dr. Warshaw. Dr. McCarty explained that he analyzed whether the 2011 Plan resulted in a partisan bias by calculating the partisan voting index ("PVI") of each

congressional district. N.T. Trial, 12/15/17, at 1421. The PVI is calculated by taking the presidential voting returns in a congressional district for the previous two elections, subtracting the national performance of each political party, and then calculating the average over those two elections. *Id.* Utilizing the PVI, Dr. McCarty opined that there was no evidence of a partisan advantage to the Republican Party under the 2011 Plan. *Id.* at 1489-90. He further suggested that, under the 2011 Plan, the Democratic Party should have won 8 of the 18 congressional seats, and that its failure to do so was the result of other factors, including candidate quality, incumbency, spending, national tides, and trends within the electorate. *Id.* at 1447-48.

Dr. McCarty criticized Dr. Chen's method of calculating the partisan performance of a district, opining that it is an imperfect predictor of how a district will vote in congressional elections. *Id.* at 1458-76. However, Dr. Chen addressed Dr. McCarty's criticisms on rebuttal, *id.* at 1675-701, "to the satisfaction of the Court." Findings of Fact at ¶ 407.

Dr. McCarty also criticized Dr. Warshaw's reliance on the efficiency gap as an indicator of gerrymandering, contending (1) that the efficiency gap does not take into consideration partisan bias that results naturally from geographic sorting; (2) that proponents of the efficiency gap have not developed principled ways of determining when an efficiency gap is too large to be justified by geographic sorting; and (3) close elections can have an effect on the calculation of efficiency gaps. N.T. Trial, 12/15/17, at 1484; *see also* Legislative Respondents' Exhibit 17 at 18-20. He further suggested there are many components to wasted votes that are not related to partisan districting. N.T. Trial, 12/15/17, at 1483-84. Finally, Dr. McCarty criticized Dr. Warshaw's testimony regarding the effect gerrymandering has on the polarization of political parties. *Id.* at 1477-82.

The Commonwealth Court found Dr. McCarty's testimony not credible with regard to his criticism of Dr. Chen's report; indeed, the court concluded that "the methodology employed by Dr. Chen to calculate partisan performance appears to have been a reliable predictor of election outcomes in Pennsylvania since the enactment of the 2011 Plan." Findings of Fact at ¶ 409. Moreover, the Commonwealth Court observed that "Dr. Chen's methodology resulted in accurate predictions for 54 out of 54 congressional elections under the 2011 Plan." *Id.*

With regard to Dr. Warshaw's expert report, the Commonwealth Court likewise determined that Dr. McCarty's criticisms were not credible to the extent he (1) disagreed that gerrymandering does not exacerbate problems associated with polarization, and (2) suggested that cracking and packing may actually benefit voters. *Id.* at ¶ 410. The court further rejected as incredible Dr. McCarty's criticism of Dr. Warshaw's reliance on the efficiency gap, noting that "Dr. Warshaw accounted for some geographic sorting in his analysis of the efficiency gap and did not dispute that close elections can impact the calculation of an efficiency gap." *Id.* Although the court credited Dr. McCarty's testimony that proponents of the efficiency gap have not developed principled methods of determining when an efficiency gap is so large it necessarily evidences partisan gerrymandering, and that wasted votes are not always the result of partisan districting, the Commonwealth Court concluded that Dr. McCarty's testimony did not lessen (1) "the weight given to Dr. Chen's testimony that the 2011 Plan is an outlier with respect to its partisan advantage," or (2) "the weight given to Dr. Warshaw's testimony that an efficiency gap exists in Pennsylvania." *Id.* at ¶¶ 411-12. The court also concluded that Dr. McCarty offered no guidance as to the appropriate test for determining when a legislature's use of partisan considerations results in unconstitutional gerrymandering. *Id.* at ¶ 413.

B. Conclusions of Law of the Commonwealth Court

After setting forth its findings of fact, the Commonwealth Court offered recommended conclusions of law. Preliminarily, the court explained that the federal Constitution requires that seats in the United States House of Representatives be reapportioned decennially among the states according to their populations as determined in the census, and commits post-reapportionment redistricting to the states' legislatures, subject to federal law. Conclusions of Law at ¶¶ 1-2 (quoting the federal Elections Clause). The court reasoned that, in Pennsylvania, although the General Assembly in performing post-reapportionment redistricting is subject to federal restrictions – *e.g.*, the requirement that districts be as equal in population as possible and the requirements of the Voting Rights Act of 1965 – it is largely free from state restrictions, as its task is not subject to explicit, specific, constitutional or statutory requirements.[50] The Commonwealth Court intimated that, although a party's claim that a legislative redistricting plan is unconstitutional on the ground that it is a partisan gerrymander is justiciable under federal and state law, *id.* at ¶ 10 (citing *Davis v. Bandemer*, 478 U.S. 109, 124-27 (1986);[51] *Erfer v. Commonwealth*, 794 A.2d 325, 331

[50] The court contrasted the General Assembly's freedom in this regard with the Legislative Reapportionment Commission's relatively lesser freedom in performing state legislative redistricting, which, as noted above, is governed by Article II, Section 16 of the Pennsylvania Constitution; political subdivisions' lesser freedom in performing political-subdivision redistricting, which is governed by Article IX, Section 11 of the Pennsylvania Constitution; and other states' lesser freedom in performing congressional redistricting subject to their own state restrictions, *see* Conclusions of Law at ¶ 7 (citing, as an example, Va. Const. art. II, § 6 (requiring Virginia's Congressional districts to be contiguous and compact)).

[51] Actually, such a claim's justiciability under federal law is, at best, unclear. In *Bandemer*, the United States Supreme Court held that such claims are justiciable under the Equal Protection Clause, but was unable to agree on an adjudicative standard. However, in *Vieth*, the court revisited the issue, and a four-Justice plurality indicated they would overrule *Bandemer*'s holding, with an equal number of Justices indicating they would reaffirm it, although they remained unable to agree on an adjudicative (continued…)

(Pa. 2002)), it is insufficient to allege that a redistricting plan employs partisan or political classifications *per se*: rather, a party must demonstrate that the plan employs *excessive* partisan or political classifications, *see id.* at ¶¶ 10-15 (citing, *inter alia*, *Vieth, supra*, at 307 (Kennedy, J., concurring) (opining that such a claim predicated on partisan or political classifications *per se* is nonjusticiable, but that one predicated on the allegation that "the [partisan or political] classifications . . . were applied in an invidious manner or in a way unrelated to any legitimate legislative objective" might be justiciable); *Erfer*, 794 A.2d at 334 (describing such a claim's justiciability as "not amenable to judicial control or correction save for the most egregious abuses."); *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 745 (Pa. 2012) ("*Holt I*") (acknowledging, in the context of state legislative redistricting, that redistricting "has an inevitably legislative, and therefore an inevitably political, element," but indicating that constitutional requirements function as a "brake on the most overt of potential excesses and abuse")). The court noted that Petitioners, insofar as they are challenging the 2011 Plan's constitutionality, bear the burden of proving its unconstitutionality, and that it is insufficient for them to demonstrate that a better or fairer plan exists; rather, they must demonstrate that the 2011 Plan clearly, plainly, and palpably violates constitutional

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standard. *See Vieth*, 541 U.S. at 270-306 (plurality opinion) (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Thomas, J.); *id.* at 317 (Stevens, J. dissenting); *id.* at 342-55 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355-68 (Breyer, J., dissenting). Justice Kennedy, concurring in the judgment, agreed with the plurality that the claim at bar was nonjusticiable, insofar as he viewed some political partisan or political classifications as permissible and, largely due to that circumstance, could not glean an appropriate adjudicative standard, but declined to foreclose future claims for which he expressed optimism that such a standard might be determined. *See id.* at 308-17 (Kennedy, J., concurring in the judgment).

requirements. *See id.* at ¶ 16 (citing, *inter alia*, *Singer v. Sheppard*, 346 A.2d 897, 900 (Pa. 1975)).

Turning to Petitioners' claims, the Commonwealth Court first rejected Petitioners' argument that the 2011 Plan violated their rights to free speech pursuant to Article I, Section 7 of the Pennsylvania Constitution and free assembly pursuant to Article I, Section 20 of the Pennsylvania Constitution. The court acknowledged that these provisions predate the First Amendment to the United States Constitution, and that, although their interpretation is often guided by analogy to First Amendment jurisprudence, they provide broader protection of individual freedom of speech and association. The court cited its decision in *Working Families Party v. Commonwealth*, 169 A.3d 1247 (Pa. Cmwlth. 2017), for the proposition that, where a party challenges a statute as violative of Article I, Sections 7 and 20, the fundamental adjudicative framework is a means-ends test weighing "the character and magnitude of the burden imposed by the [statute] against the interests proffered to justify that burden": specifically, "'regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest[;] [l]esser burdens, however, trigger less exacting review, and a [s]tate's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" Conclusions of Law at ¶ 25 (quoting *Working Families Party*, 169 A.3d at 1260-61 (internally quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (internal quotation marks omitted))). The court then explained that this Court has recognized that the right to free speech includes the right to free speech unencumbered by official retaliation:

> To prove a claim of retaliation, a plaintiff must establish: (1) the plaintiff was engaged in a constitutionally protected activity; (2) the defendant's action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3)

> the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights.

Id. at ¶ 26 (quoting *Uniontown Newspapers, Inc. v. Roberts*, 839 A.2d 185, 198 (Pa. 2003) (internal citations and quotation marks omitted)).

Observing that no majority of the United States Supreme Court has yet addressed a challenge to a redistricting plan as violative of the First Amendment and that no Pennsylvania court has yet considered a challenge to a redistricting plan as violative of Article I, Sections 7 and 20, the court remarked that Petitioners are not precluded by the 2011 Plan from freely associating with any candidate or political party or from voting. The court characterized Petitioners' claims as actually seeking a declaration that they are entitled to a redistricting plan "free of any and all partisan considerations," noting that such a right was "not apparent in the Pennsylvania Constitution or in the history of gerrymandering decisions in Pennsylvania or throughout the country," and that both the United States Supreme Court and this Court have previously acknowledged that partisan considerations may play some role in redistricting. *Id.* at ¶¶ 27-38 (citing *Vieth* and *Holt I*).

The court then noted Justice Kennedy's remarks in *Vieth* that courts must have some judicially administrable standard by which to appraise partisan gerrymanders, and found that Petitioners presented no such standard.[52] Finally, assuming *arguendo* that

[52] Later, the Commonwealth Court explained:

> [s]ome unanswered questions that arise based on Petitioners' presentation include: (1) what is a constitutionally permissible efficiency gap; (2) how many districts must be competitive in order for a plan to pass constitutional muster (realizing that a competitive district would result in a skewed efficiency gap); (3) how is a "competitive" district defined; (4) how is a "fair" district defined; and (5) must a plan guarantee a minimum number of congressional seats in favor of one party or another to be constitutional.

(continued…)

Petitioners' putative retaliation claim is cognizable under Pennsylvania law, the court found that Petitioners failed to establish the same. Although conceding that Petitioners were engaged in constitutionally-protected political activity, the court first found that they failed to establish that the General Assembly caused them to suffer any injury that would chill a person of ordinary firmness from continuing to engage in such activity, essentially because they remained politically active:

> With respect to the second element, Petitioners all continue to participate in the political process. Indeed, they have voted in congressional races since the implementation of the 2011 Plan. The Court assumes that each Petitioner is a person of [at least] ordinary firmness.

Id. at ¶ 34.

The court also determined that Petitioners failed to establish that the General Assembly's adoption of the 2011 Plan was motivated in part as a response to Petitioners' participation in the political process, essentially reasoning that intent to gain a partisan advantage over a rival faction is not equivalent to an intent to punish the faction's voters, that gleaning the intent of the General Assembly as a body was largely impossible, and that the fact that some Democratic state representatives voted in favor of the 2011 Plan undermined the notion that its intent was to punish Democratic voters:

> With respect to the third element, Petitioners have similarly failed to adduce evidence that the General Assembly passed the 2011 Plan with any motive to retaliate against Petitioners (or others who voted for Democratic candidates in any particular election) for exercising their right to vote. . . .
>
> Intent to favor one party's candidates over another should not be conflated with motive to retaliate against voters for casting their votes for a particular candidate in a prior election. There is no record evidence to suggest that in

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Conclusions of Law at ¶ 61 n.24.

> voting for the 2011 Plan, the General Assembly, or any particular member thereof, was motivated by a desire to punish or retaliate against Pennsylvanians who voted for Democratic candidates. Indeed, it is difficult to assign a singular and dastardly motive to a branch of government made up of 253 individual members elected from distinct districts with distinct constituencies and divided party affiliations. . . .
>
> On final passage of the 2011 Plan in the PA House, of the 197 members voting, 136 voted in the affirmative, with some Republican members voting in the negative and 36 Democratic members voting in the affirmative. Given the negative Republican votes, the 2011 Plan would not have passed the PA House without Democratic support. The fact that some Democrats voted in favor of the 2011 Plan further militates against a finding or conclusion that the General Assembly passed the 2011 Plan, in whole or in part, as a response to actual votes cast by Democrats in prior elections.

Id. at ¶¶ 35-37 (paragraph numbering omitted).

Next, the court rejected Petitioners' argument that the 2011 Plan violated their rights to equal protection pursuant to Article I, Sections 1 and 26 of the Pennsylvania Constitution (the "Equal Protection Guarantee") and their right to free and equal elections pursuant to Article I, Section 5 of the Pennsylvania Constitution. The court opined that, "[i]n the context of partisan gerrymandering, the Pennsylvania Supreme Court has stated that the Equal Protection Guarantee is coterminous with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution," Conclusions of Law at ¶ 45 (citing *Erfer*, 794 A.2d at 332 (citing *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991)); *Kramer v. Workers' Comp. Appeal Bd. (Rite Aid Corp.)*, 883 A.2d 518, 532 (Pa. 2005); *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d

773, 789 n. 24 (Pa. Cmwlth. 2013), *aff'd*, 104 A.3d 1096 (Pa. 2014); *Doe v. Miller*, 886 A.2d 310, 314 n.9 (Pa. Cmwlth. 2005), *aff'd per curiam*, 901 A.2d 495 (Pa. 2006)).[53] [54]

The Commonwealth Court further opined that this Court has previously described the Free and Equal Elections Clause as requiring that elections "are public and open to all qualified electors alike;" that "every voter has the same right as any other voter;" that "each voter under the law has the right to cast his ballot and have it honestly counted;" that "the regulation of the right to exercise the franchise does not deny the franchise[;]" and that "no constitutional right of the qualified elector is subverted or denied him[,]" but, in the context of partisan gerrymandering, merely reiterates the protections of the Equal

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[53] The court further opined that *Erfer* was "consistent with decades of Pennsylvania Supreme Court precedent holding that the 'equal protection provisions of the Pennsylvania Constitution are analyzed . . . under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.'" Conclusions of Law at ¶ 45 (quoting *Love*, 597 A.2d at 1139; citing *Commonwealth v. Albert*, 758 A.2d 1149, 1151 (Pa. 2000); *James v. SEPTA*, 477 A.2d 1302, 1305 (Pa. 1984); *Laudenberger v. Port Auth. of Allegheny Cnty.*, 436 A.2d 147, 155 n.13 (Pa. 1981); *Baltimore & Ohio R.R. Co. v. Commonwealth*, 334 A.2d 636, 643 (Pa. 1975)).

[54] Notably, in *Erfer*, our determination that the Equal Protection Guarantee was to be adjudicated as coterminous with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was predicated on *Love*, in which we merely remarked that the Equal Protection Guarantee and Equal Protection Clause involve the same jurisprudential framework – *i.e.*, a means-ends test taking into account a law's use of suspect classification, burdening of fundamental rights, and its justification in light of its objectives. *See Erfer*, 794 A.3d at 331-32; *Love*, 597 A.2d at 1139. The same was true in *Kramer*, where we remarked that we had previously employed "the same standards applicable to federal equal protection claims" and that the parties therein did not dispute "that the protections [were] coterminous[.]" *Kramer*, 883 A.2d at 532. Moreover, our affirmance in *Zauflik* was rooted in the parties' failure to conduct an analysis under *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). *See Zauflik*, 104 A.3d at 1117 n.10; *infra* note 53. Finally, concerning *Doe*, the issue was not meaningfully litigated before the Commonwealth Court, and, in any event, this Court affirmed its decision *per curiam*, rendering it of no salient precedential value in the instant case. *See Commonwealth v. Tilghman*, 673 A.2d 898, 903-05 (Pa. 1996) (noting that orders affirming a lower court's *decision*, as opposed to its *opinion*, *per curiam* should not be construed as endorsing its reasoning).

Protection Guarantee. *Id.* at ¶¶ 40 (citing *In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d 132 (Pa. 1992) (quoting *City Council of City of Bethlehem v. Marcincin*, 515 A.2d 1320, 1323 (Pa. 1986)), and *Erfer*, 794 A.2d at 332).[55]

The court explained that, in *In re 1991 Legislative Reapportionment Comm'n*, this Court adopted a standard suggested by a plurality of justices in *Bandemer* for determining whether a redistricting plan was unconstitutional on the basis of partisan gerrymandering:

> A plaintiff raising a gerrymandering claim must establish that there was intentional discrimination against an identifiable political group and that there was an actual discriminatory effect on that group. In order to establish discriminatory effect, the plaintiff must show: (1) that the identifiable group has been, or is projected to be, disadvantaged at the polls; (2) that by being disadvantaged at the polls, the identifiable group will lack political power and be denied fair representation.

Conclusions of Law at ¶ 47 (internal quotation marks, citations, and brackets omitted). The Commonwealth Court acknowledged that *Bandemer*'s and, with it, *Erfer*'s test, was abrogated by *Vieth* as a matter of federal law, but, noting that this Court has not yet specifically discarded it, nevertheless endeavored to apply it to Petitioners' claim. Although acknowledging that Petitioners had established intentional discrimination – in that the General Assembly was likely aware of, and intended, the 2011 Plan's political consequences – the court determined that Petitioners could not establish that they constituted an identifiable political group:

[55] Notably, as discussed below, although we did reject in *Erfer* the suggestion that the Free and Equal Elections Clause provided greater protection of the right to vote than the Equal Protection Guarantee, our rejection was predicated on the lack of a persuasive argument to that end. *Erfer*, 794 A.2d at 331-32.

> In light of the standard articulated in *Erfer*, and based on the evidence adduced at trial, Petitioners have established intentional discrimination, in that the 2011 Plan was intentionally drawn so as to grant Republican candidates an advantage in certain districts within the Commonwealth. . . . Although the 2011 Plan was drawn to give Republican candidates an advantage in certain districts within the Commonwealth, Petitioners have failed to meet their burden of showing that the 2011 Plan equated to intentional discrimination against an identifiable political group. . . . Voters who are likely to vote Democratic (or Republican) in a particular district based on the candidates or issues, regardless of the voters' political affiliation, are not an identifiable political group for purposes of the Equal Protection Guarantee under the Pennsylvania Constitution.

Id. at ¶¶ 51-53 (paragraph numbering omitted).

Moreover, the court found that Petitioners had failed to establish that they would be disadvantaged at the polls or would lack political power or fair representation, noting that they remain free to participate in democratic processes:

> While Petitioners contend that Republican candidates who prevail in congressional districts do not represent their particular views on issues important to them and will effectively ignore them, the Court refuses to make such a broad finding based on Petitioners' feelings. There is no constitutional provision that creates a right in voters to their elected official of choice. As a matter of law, an elected member of Congress represents his or her district in its entirety, even those within the district who do not share his or her views. This Court will not presume that members of Congress represent only a portion of their constituents simply because some constituents have different priorities and views on controversial issues. . . . At least 3 of the 18 congressional districts in the 2011 Plan are safe Democratic seats. . . . Petitioners can, and still do, campaign for, financially support, and vote for their candidate of choice in every congressional election. . . . Petitioners can still exercise their right to protest and attempt to influence public opinion in their congressional district and throughout the Commonwealth. . . . Perhaps most importantly, Petitioners and likeminded voters from across the Commonwealth can exercise their political power at the polls to elect legislators and a Governor who will address and remedy any unfairness

> in the 2011 Plan through the next reapportionment following the 2020 U. S. Census.

Conclusions of Law at ¶ 56 (paragraph labeling omitted).[56]

Finally, in a post-script summary, the court reiterated its view that Petitioners had failed to identify a judicially manageable standard for claims of partisan gerrymandering, and noted that it predicated its conclusions of law on what it viewed as the "evidence presented and the current state of the law," acknowledging that there are matters pending before the United States Supreme Court that might impact the applicable legal framework. *Id.* at ¶ 65 (citing *Gill v. Whitford, supra*; *Benisek v. Lamone* No. 17-333 (U.S. jurisdictional statement filed Sept. 1, 2017)).

IV. Arguments

A. Petitioners and Aligned Respondents and *Amici*

We now address the arguments presented to this Court. We begin with Petitioners, those Respondents arguing that Petitioners are entitled to relief, and Petitioners' supporting *amici*.

Petitioners first assert that the 2011 Plan violates the free expression and free association clauses of the Pennsylvania Constitution, *see* Pa. Const. art. I, §§ 7, 20, which, they highlight, pre-date the First Amendment and provide broader protections for speech and associational rights than those traditionally recognized under the federal Constitution. Consistent with that notion, Petitioners emphasize that, in contrast to federal challenges to laws restricting the freedom of expression, which are assessed under the rubric of intermediate scrutiny, courts apply the more exacting strict scrutiny standard to challenges to such laws under the Pennsylvania Constitution. *See*

[56] On the court's last point, one imagines that Petitioners find cold comfort in their right to protest and advocate for change in an electoral system that they allege has been structurally designed to marginalize their efforts in perpetuity.

Petitioners' Brief at 46-47 (citing *Pap's A.M. v. City of Erie*, 812 A.2d 591 (2002) ("*Pap's II*")).

According to Petitioners, these broad protections under the Pennsylvania Constitution's Article I, Section 7 free expression clause necessarily extend to the act of voting, as voting constitutes direct "personal expression of favor or disfavor for particular policies, personalities, or laws," Petitioners' Brief at 47-48 (quoting *Commonwealth v. Cobbs*, 305 A.2d 25, 27 (Pa. 1973)), and gives voters a firsthand opportunity to "express their own political preferences." *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 288 (1992)). Petitioners further suggest that the political nature of the expression inherent in voting deserves even greater protection than other forms of expression, as "the right to participate in electing our political leaders" is the most "basic [right] in our democracy." *Id.* (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (plurality)).

While Petitioners recognize that, in the instant matter, the 2011 Plan does not entirely limit Democratic voters' political expression, they note that laws which discriminate against or burden protected expression based on content or viewpoint — including those laws which render speech less effective — are nevertheless subject to strict scrutiny analysis. Petitioners' Brief at 49 (citing *Ins. Adjustment Bureau v. Ins. Com'r for Com. of Pa.*, 542 A.2d 1317, 1323-24 (Pa. 1988)). Petitioners maintain that such is the case here, as the Plan was drawn to give Republicans an advantage in 13 out of 18 congressional districts (*see* Conclusions of Law at ¶ 52; Findings of Fact at ¶ 291) and discriminates against the political viewpoint of Democratic voters across the Commonwealth by: splitting traditionally Democratic strongholds to reduce the effectiveness of the Democratic vote — *i.e.*, Erie County, Harrisburg, and Reading; removing predominantly Democratic municipalities from their broader communities and

combining them with other Democratic municipalities to dilute the weight of the Democratic vote — *i.e.*, Swarthmore, Easton, Bethlehem, Scranton, Wilkes-Barre, and the Allegheny River Valley; or knitting together "disparate Republican precincts while excising Democratic strongholds" to diminish the representational rights of Democrats — *i.e.*, Pennsylvania's 12th District. Petitioners' Brief at 52.

As further proof of the diminished value of the Democratic vote under the 2011 Plan, Petitioners emphasize that, in each of the past three elections, Democrats won only 5 of the 18 seats, despite winning the majority of the statewide congressional vote in 2012 and nearly half of that vote in 2014 and 2016. Petitioners also rely upon the experts' testimony and alternative plans, described above, which they contend constitute "powerful evidence" of the intent to disadvantage Democratic voters. *Id.* at 53 (quoting *Holt I*, 38 A.3d at 756-57).

In light of the above evidence, Petitioners argue that the 2011 Plan does not satisfy strict scrutiny — or *any* scrutiny, for that matter — because Legislative Respondents failed to identify any legitimate, much less compelling, governmental interest served by drawing the congressional district boundaries to disadvantage Democratic voters. As such, Petitioners criticize the Commonwealth Court for failing to address whether the Plan constitutes viewpoint discrimination and for failing to assess the Plan with any measure of judicial scrutiny — strict scrutiny or otherwise.

While the Commonwealth Court found that Petitioners failed to offer a manageable standard for determining when permissible partisanship in drawing districts becomes unconstitutional, Petitioners maintain that the constitutional prohibition against viewpoint discrimination and the strict scrutiny standard are indeed the appropriate standards by which to assess their claim, noting that courts have long applied modern constitutional principles to invalidate traditionally acceptable practices, such as the

gerrymandering employed in the instant case. Petitioners' Brief at 55 (citing *Elrod v. Burns*, 427 U.S. 347 (1976) (holding that the First Amendment to the United States Constitution prohibited the practice of terminating government employees on a partisan basis); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (invalidating the practice of drawing legislative districts with unequal population)). Petitioners additionally take issue with the Commonwealth Court's conclusion that there is no right to a "nonpartisan, neutral redistricting process," Conclusions of Law at ¶ 30, noting that the cases upon which the Commonwealth Court relied in reaching this conclusion were equal protection cases, and, thus, distinguishable from free speech-based gerrymandering challenges, which the high Court allowed to proceed in *Shapiro v. McManus*, 136 S. Ct. 450 (2015). Petitioners' Brief at 57 (citing *Erfer*, 794 A.2d at 328 n.2).

Based on the foregoing, Petitioners urge this Court to find that the Pennsylvania Constitution categorically prohibits partisan gerrymandering to any degree, as it "serves no good purpose and offers no societal benefit." *Id.* However, Petitioners argue that, even if some partisan considerations were permitted in drafting the map of congressional districts, this Court should nevertheless hold that the 2011 Plan's "extreme and obvious viewpoint discrimination" is unconstitutional. *Id.* at 58. Petitioners offer that, at a minimum, the subordination of traditional districting criteria in an attempt to disadvantage a party's voters based on their political beliefs, as they claim Respondents did in the instant case, should be prohibited.

Alternatively, Petitioners allege that the 2011 Plan impermissibly retaliates against Democratic voters based upon their voting histories and party affiliation. Petitioners note that, to establish a free-speech retaliation claim in the context of redistricting, a party must establish that: (1) the plan intended to burden them "because of how they voted or the political party with which they were affiliated"; (2) they suffered

a "tangible and concrete adverse effect"; and (3) the retaliatory intent was a "but for" cause of their injury. *Id.* at 59-60 (quoting *Shapiro v. McManus*, 203 F. Supp.3d 579, 596-98 (D. Md. 2016)). Petitioners maintain that they have satisfied each of the three elements of this test and that the Commonwealth Court erred in finding otherwise.

With respect to the first retaliation prong, Petitioners assert that the materials provided by Speaker Turzai in the federal litigation, discussed above, are "direct, conclusive evidence that the mapmakers drew district boundaries to disadvantage Democratic voters *specifically* based on their voting histories, which the mapmakers measured for every precinct, municipality, and county in Pennsylvania." *Id.* at 60 (emphasis original). Petitioners claim this is further evidenced by the testimony of their experts, which demonstrated that the mapmakers used Democratic voters' past voting history when "packing and cracking" legislative districts to subject those voters to disfavored treatment. *Id.* Regarding the second prong, Petitioners argue that they proved the Plan caused them to suffer a tangible and concrete adverse effect — namely, losing several seats statewide. Finally, as to the third prong, Petitioners contend that they would have won at least several more seats had the Plan not been drawn to intentionally burden Democratic voters based on their past voting histories.

In rejecting their claim, the Commonwealth Court relied upon the three-part test in *Uniontown Newspapers*, which required, *inter alia*, the challenger to establish that the action caused "an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity." *Uniontown Newspapers*, 839 A.2d at 198. However, Petitioners submit that doing so was improper because "chilling" is not an element of a constitutional retaliation claim. Rather, according to Petitioners, the focus on "chilling" in *Uniontown Newspapers* was due to the fact that it was the only injury alleged in the case, not because it was the only cognizable injury in a retaliation case.

Indeed, Petitioners suggest that they suffered multiple concrete harms wholly separate from any chilling, which they claim is sufficient to establish the second prong of the retaliation test. In any event, Petitioners argue that they were, in fact, chilled, as, objectively, the Plan's "uncompetitive districts clearly would deter many 'ordinary' persons from voting." Petitioners' Brief at 63.

Lastly, Petitioners reject the Commonwealth Court's conclusion that the General Assembly lacked a retaliatory motive, noting the "overwhelming evidence" — including the documents produced by Speaker Turzai — conclusively established that the mapmakers considered Democrats' votes in prior elections when drawing the map to disadvantage Democratic voters.

Petitioners next argue that the Plan violates equal protection principles and the Free and Equal Elections Clause of the Pennsylvania Constitution. *Id.* at 64 (quoting Pa. Const. art I, §§ 1, 5, 26). Specifically, principally relying upon the standard articulated in *Erfer*, Petitioners explain that a congressional districting map violates the equal protection clause if it reflects "intentional discrimination against an identifiable political group" and if "there was an actual discriminatory effect on that group." *Id.* at 65 (quoting *Erfer*, 794 A.2d at 332). First, regarding the intentional discrimination requirement, Petitioners maintain that the overwhelming evidence proved that the 2011 Plan intentionally discriminated against Democratic voters, noting the Commonwealth Court specifically found that such discrimination occurred. Second, with respect to the identifiable political group requirement, Petitioners argue that Democratic voters do, in fact, constitute an identifiable political group, citing the statistical evidence from Dr. Chen regarding the high correlation in the level of support for Democratic candidates in particular geographic units and Dr. Warshaw's expert opinion with respect to the highly predictable nature of congressional elections based on political party.

Third, Petitioners assert that the Plan had an actual discriminatory effect on Democratic voters in the Commonwealth, arguing that, thereby, they have been discriminated against in an exercise of their civil right to vote in violation of Article I, Section 26, and deprived of an "equal" election in violation of the Free and Equal Elections Clause. As noted, at least as a matter of equal protection, Petitioners must prove: (1) that the Plan created disproportionate results at the polls, and (2) that they have "essentially been shut out of the political process." *Erfer*, 794 A.2d at 333. Petitioners allege, based upon the evidence detailed above, that they satisfy the first element because drawing the Plan to purposely diminish the effectiveness of Democrats' votes and to give Republicans the advantage at the polls created disproportional election results, denying Democrats political power and fair representation. Petitioners submit, however, that the second "shut out of the political process" element should be eliminated because it is vague and "unworkable," claiming that *Erfer* provided no guidance regarding the type of evidence that would satisfy that standard, and that *Bandemer*, *supra*, upon which *Erfer* was based, did not impose such a requirement. Petitioners further suggest that imposing an "essentially shut out" requirement is counterintuitive, as it would allow partisan map drawers to continue to politically gerrymander so long as the minority party receives *some* of the congressional seats. In any event, Petitioners argue that, because the Plan artificially deprives Democratic voters of the ability to elect a Democratic representative, and, given the extreme political polarization between the two political parties, Republican representatives will not adequately represent Democrats' interests, thus shutting Democratic voters out of the political process.

Finally, Petitioners reject the Commonwealth Court's conclusion that the Plan satisfies equal protection principles because Democrats potentially will have the

opportunity to influence the new map in 2020. Petitioners emphasize that "the possibility that the legislature may itself change the law and remedy the discrimination is not a defense under the Pennsylvania Constitution," as, under that logic, *every* discriminatory law would be constitutional. Petitioners' Brief at 73.

Petitioners requested that this Court give the legislature two weeks to develop a new, constitutional plan that satisfies non-partisan criteria, and that we adopt a plan ourselves with the assistance of a special master if the legislature fails to do so.

Executive Respondents Governor Wolf, Secretary Torres, Commissioner Marks and Lieutenant Governor Stack have filed briefs supporting Petitioners, arguing, for largely the same reasons advanced by Petitioners, that the 2011 Plan violates the free expression and free association provisions of the Pennsylvania Constitution, as well as equal protection principles and the Free and Equal Elections Clause. Further, Executive Respondents agree that the evidence provided by Petitioners was sufficient to establish that the Plan is unconstitutional.

Beyond the points raised by Petitioners, Executive Respondents Wolf, Torres, and Marks assert that, although the Commonwealth Court found that Petitioners were required to provide a standard to assess when partisan considerations in creating a redistricting plan cross the line into unconstitutionality, no such bright line rule was necessary to determine that the Plan was unconstitutional in this case, given the extreme and, indeed, flagrant level of partisan gerrymandering that occurred. Additionally, while the Commonwealth Court suggested that Petitioners' standard must account for a variety of specific variables such as the number of districts which must be competitive and the constitutionally permissible efficiency gap percentage, Respondents Wolf, Torres, and Marks argue that precise calculations are not required, noting that "courts routinely decide constitutional cases using judicially manageable standards that

are rooted in constitutional principles but that are not susceptible of precise calculation." Wolf, Marks, and Stack Brief at 8 (citing, *e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996) (declining "to draw a bright line marking the limits of a constitutionally acceptable punitive damages award," but finding "the grossly excessive award imposed in this case transcends the constitutional limit")). *Id.* at 9. Respondents Wolf, Torres, and Marks further observe that this Court, in invalidating a prior state legislative redistricting plan as contrary to law in *Holt I*, expressly rejected "the premise that any predetermined [population] percentage deviation [existed] with which any reapportionment plan [had to comply]," and declined to "set any immovable 'guideposts' for a redistricting commission to meet that would guarantee a finding of constitutionality." *Id.* at 10 (quoting *Holt I*, 38 A.3d at 736).

For his part, Respondent Stack adds that, while he concurs with Petitioners' position that the Plan fails strict scrutiny analysis, in his view, the Plan also fails under the rational basis standard, as the Plan "lacks a legitimate state interest, and instead advances the impermissible interest of achieving partisan advantage." Stack Brief at 24. Respondent Stack further argues that, "[a]lthough the Legislative Respondents proffered the hypothetical state interests of redrawing the district maps to conform to the results of the census, they cannot and do not offer any rational relationship between that interest and the map they drew." *Id.* at 27. Additionally, with respect to Petitioners' claim under the Free and Equal Elections Clause, Respondent Stack emphasizes that "[t]he constitutional requirement of 'free and equal elections' contemplates that all voters are to be treated equally." *Id.* at 25. As the Plan was overtly drawn to favor Republicans, Respondent Stack maintains that the Plan "exhibits the heavy hand of state action . . . offensive to democracy," violating the Commonwealth's duty to ensure that it provides free and equal elections. *Id.* at 26.

Executive Respondents provide additional insight into how this Court should fashion a remedy, noting that, as representatives of the department that administers elections in Pennsylvania, they are uniquely positioned to make suggestions in this regard. Specifically, Respondents Wolf, Torres, and Marks offer that it is still possible to hold the primary on the scheduled May 15 date if a new redistricting map is in place by February 20, 2018. However, they submit that it would also be possible, through a series of internal administrative adjustments and date changes, to postpone the primary elections from May to the summer of 2018, which would allow a new plan to be administered as late as the beginning of April.

As to the process of creating a new plan, Respondents Wolf, Torres, and Marks assert that three weeks is a reasonable time period for the General Assembly and Governor to enact and sign into law a new redistricting plan, noting that the General Assembly previously enacted a revised congressional districting plan within only 10 days of the court's order to do so. Wolf, Torres, Marks Brief at 25 (citing *Vieth v. Pennsylvania*, 241 F. Supp.2d 478, 480 (M.D. Pa. 2003), *aff'd sub nom. Vieth,* 541 U.S. at 267). However, if the General Assembly fails to enact a plan by the Court's deadline, Respondents Wolf, Torres, and Marks suggest that this Court should draft a plan upon consideration of the evidence submitted by the parties. *Id.* at 26 (citing *League of Women Voters of Florida v. Detzner*, 179 So.3d 258 (Fla. 2015)).

Respondent Stack agrees with the suggestion of Respondents Wolf, Torres, and Marks that this Court may, and indeed should, adopt a new redistricting plan if the General Assembly and the Governor cannot reach an agreement on a constitutionally valid map in time for the 2018 congressional primaries. Should this Court take that route, Respondent Stack cites favorably one of the maps developed by Dr. Chen – Chen Figure 1, Petitioners' Exhibit 3 (identified as Simulated Plan 1 above) – which he

maintains serves as a good guide, claiming that it meets or exceeds the 2011 Plan based on traditional redistricting criteria, and provides sufficient data to judge its compliance with traditional districting criteria, as well as federal Voting Rights Act requirements. Stack Brief at 10-15, 39. Respondent Stack offers that this Court should retain a special master, who could reference Dr. Chen's map as a guide in drawing a new map, should the legislature fail to produce a map in a timely fashion.

Amicus Common Cause, like Petitioners, contends that the 2011 Plan violates the Free and Equal Elections Clause of the Pennsylvania Constitution, asserting that this clause provides greater protections to the right to vote than the federal Equal Protection Clause.

Relying upon our seminal decision in *Edmunds*, *supra*,[57] which provides the framework for analyzing whether a right under the Pennsylvania Constitution is more expansive than its federal counterpart, Common Cause first argues that the text of the Free and Equal Elections Clause demonstrates that it should be viewed as independent from the Equal Protection Clause of the United States Constitution. Common Cause notes that, in contrast to the more general provisions of the Pennsylvania Constitution such as Article I, Sections I and 26, which implicate, but do not specifically address, the

[57] *Edmunds* instructs that an analysis of whether a right under the Pennsylvania Constitution affords greater protection than the United States Constitution encompasses the following four factors:

> 1) text of the Pennsylvania constitutional provision;
>
> 2) history of the provision, including Pennsylvania case-law;
>
> 3) related case-law from other states;
>
> 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Edmunds, 586 A.2d at 895.

right to vote, Article I, Section 5's proclamation that "[e]lections shall be free and equal" and that "no power . . . shall at any time interfere to prevent the free exercise of the right of suffrage" is direct and specific, indicating that the clause should not be "subsumed into Sections 1 and 26, let alone federal jurisprudence." Common Cause Brief at 6-7.

Second, Common Cause argues that the history of the Free and Equal Elections Clause supports giving it independent effect. Specifically, Common Cause highlights that, since as early as 1776, Pennsylvania has recognized the importance of the right to vote, providing in Chapter I, Section VII of the Declaration of Rights that "all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office." *Id.* (quoting Pa. Const. of 1776, ch. I, § VII). Common Cause continues that, in 1790, Pennsylvania adopted the Free and Equal Elections Clause into its Constitution, but the federal Constitution was, and continued to be, largely silent regarding the right to free and equal elections, containing no comparable provision and leaving "the selection of representatives and senators largely to the states, subject to minimum age and eligibility requirements." *Id.* at 8-9. While the United States later adopted the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Common Cause stresses that it did not do so until 1868 — many decades after Pennsylvania had declared free and equal elections a fundamental right. Thus, in light of the temporal differences between the two provisions and the fact that the federal Equal Protection Clause does not specifically address elections, Common Cause maintains that the Free and Equal Elections Clause and the federal Equal Protection Clause should not be viewed as coterminous.

Common Cause also suggests that Pennsylvania case law supports giving the Free and Equal Elections Clause independent effect, noting that this Court has

interpreted the clause since as early as the 1860s, when the Court explained that elections are made equal by "laws which shall arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth." *Id.* at 11 (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (Pa. 1869)). This Court further provided, with respect to the concept of legislative deference under the Free and Equal Elections Clause, that, although the General Assembly enjoys discretion in creating laws to ensure that elections are equal, the legislature's actions in this regard may be reviewed "in a case of plain, palpable, and clear abuse of the power which actually infringes on the rights of the electors." *Id.* (quoting *Patterson*, 60 Pa. at 75). Common Cause additionally highlights that our case law historically has recognized that the creation of "suitable districts" in accordance with the Free and Equal Elections Clause relies heavily on "the guiding principles respecting compactness, contiguity, and respect for the integrity of political subdivisions." *Id.* at 13 (quoting *Holt I*, 38 A.3d at 745). Given the significant amount of time between the passage of the Free and Equal Elections Clause and the Fourteenth Amendment to the United States Constitution, as well as the separate attention that our Court has given to the Free and Equal Elections Clause, Common Cause suggests that "[i]t is incoherent to assume that Pennsylvania's jurisprudence under the [Free and Equal Elections Clause] disappeared into the Fourteenth Amendment." *Id.* at 11.

Third, Common Cause argues that the relative dearth of case law from other jurisdictions regarding free and equal elections illustrates that Pennsylvania was a "trailblazer in guaranteeing the right to vote," noting that, of the original 13 states, only the Pennsylvania, Delaware, and Massachusetts Constitutions contained a clause guaranteeing free and equal elections. *Id.* at 14. While Common Cause offers that at

least one other state — Alaska — has found that its state constitution provides greater protection against gerrymandering than the federal Constitution, *see Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987), Common Cause suggests that the general lack of comparable provisions in other state constitutions indicates that, "[a]s in 1776, Pennsylvania should lead the states in declaring the right to free and fair elections, this time by stamping out gerrymandering." Common Cause Brief at 14.

Lastly, Common Cause asserts that the Pennsylvania Constitution defeats traditional policy arguments made in support of the practice of gerrymandering, such as the purported difficulty in identifying a workable standard to assess constitutional violations and the notion of legislative deference in drawing congressional districts. More specifically, with respect to the difficulty of identifying a standard, Common Cause submits that the three criteria long used for drawing voting districts in Pennsylvania — compactness, contiguity, and integrity of political subdivisions — provide a sufficient standard by which to assess whether an electoral map violates the Free and Equal Elections Clause. Common Cause stresses that, because these criteria are specifically written into the Pennsylvania Constitution, *see* Pa Const. art. II, § 16 ("representative districts . . . shall be composed of compact and continuous territory as nearly equal in population as practicable . . . . Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district"), and have provided the basis for invalidating state legislative district maps in the past, *see Holt I*, *supra*, they are sufficiently precise as to present a feasible standard for evaluating the constitutionality of a congressional district map under the Free and Equal Elections Clause. Additionally, regarding the principle of legislative deference, Common Cause argues that legislative deference does not give the General Assembly unfettered discretion to engage in partisan gerrymandering

without judicial interference, noting that, unlike the federal Constitution, Pennsylvania's Constitution specifically requires the Court to review challenges to state legislative district maps. *See* Pa. Const. art. II, § 17(d). While Common Cause concedes that the legislature typically enjoys substantial deference in redistricting matters, it maintains that such deference is not warranted in circumstances, such as in the instant case, where the "faction in control of the legislature" used its authority to create political advantage, rather than to create a map which reflects the "true will of the people." Common Cause Brief at 17.

Asserting that the four *Edmunds* factors support giving the Free and Equal Elections Clause independent effect, Common Cause concludes that the 2011 Plan violates that provision because, as exhibited by Petitioners' evidence, it is not compact or contiguous, nor does it respect political subdivision boundaries. Moreover, Common Cause asserts that the secretive manner in which the Plan was created strongly suggests that the legislature drew the congressional districts with the improper, highly partisan motive of benefitting the Republican Party, rather than doing so with the will of the people in mind. Under these circumstances, Common Cause argues that this Court should uphold the democratic principles of the Pennsylvania Constitution and strike down the gerrymandered Plan pursuant to the Free and Equal Elections Clause.

Amicus Brennan Center for Justice ("Brennan Center") likewise argues on behalf of Petitioners that this Court can, and indeed should, strike down the 2011 Plan as unconstitutional. In so asserting, Brennan Center emphasizes that, although some degree of good faith political "give-and-take" is bound to occur with the redistricting process, this case presents a particularly extreme, unconstitutional form of partisan gerrymander which must be remedied by this Court. While the Commonwealth Court below highlighted the difficulty with identifying a workable standard to assess when,

precisely, partisan gerrymandering becomes unconstitutional, Brennan Center maintains that "judicial action to stamp out extreme gerrymanders can be focused and limited," Brennan Center Brief at 6, explaining that cases of extreme, unconstitutional gerrymandering are relatively rare and are easily detectable based upon two, objective indicia: single-party control of the redistricting process and a recent history of competitive statewide elections. *Id.* at 7. Brennan Center observes that these factors have been present in every state in the past decade which had a congressional districting map showing extreme partisan bias, including Pennsylvania during the creation of the 2011 Plan. Brennan Center further offers that other accepted quantitative metrics, such as the efficiency gap, the seats-to-votes curve, and the mean-median vote share, can measure the level of partisan bias in a state and assist in identifying extreme gerrymandering, noting that the 2011 Plan performed poorly under each of these metrics.

While Brennan Center acknowledges that federal courts have been hesitant to exercise jurisdiction over partisan gerrymandering claims because of concerns over federalism and excessive burdens on the federal docket, Brennan Center suggests that this Court is not subject to the same constraints. Moreover, Brennan Center highlights that the political question doctrine, which has also hamstrung federal courts in partisan gerrymandering cases, does not restrict this Court from acting in such cases, as this Court held that the political question doctrine renders a case non-justiciable only when the Pennsylvania Constitution "explicitly or implicitly" demonstrates "the clear intent to entrust the legislature with the sole prerogative to assess the adequacy of its own effort[s]," *id.* at 19 (quoting *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 439 (Pa. 2017)), and the Pennsylvania Constitution contains no such limitation with regard to interpreting the constitutionality of partisan congressional redistricting.

Finally, Brennan Center contends that extreme partisan gerrymandering, such as in the instant case, is "contrary to fundamental constitutional and democratic values," undermining both legislative accountability to the people and legislative representativeness. *Id.* at 15. Brennan Center asserts that finding the Plan unconstitutional in this case will "enhance the legitimacy of Pennsylvania's democracy" and restore confidence among Pennsylvanians in the political process. *Id.* at 23.

Similar to the points raised by Petitioners, as *amicus*, the AFL-CIO argues that the 2011 Plan is unconstitutional under Article I, Sections 7 and 20 and Article I, Section 5 of the Pennsylvania Constitution, which it asserts provides an independent basis for relief. The AFL-CIO further suggests that Article I, Section 1 of the Pennsylvania Constitution, which ensures equality under the law, and Article I, Section 26 of the Pennsylvania Constitution, which protects Pennsylvanians against the denial or discrimination of their civil rights, provide additional bases for relief under state law and support reviewing the Plan under strict scrutiny.

Analyzing each of these provisions pursuant to the *Edmunds* factors, the AFL-CIO highlights the rich history of the Pennsylvania Constitution, including, most notably, that the Pennsylvania Constitution was at the forefront of ensuring robust rights associated with representational democracy, such as the right to freedom of speech and association, the right to equality under the law, and the right to vote in free and equal elections, which the AFL-CIO notes Pennsylvania extended, quite remarkably, to those individuals who did not own property. Moreover, with respect to the Free and Equal Elections Clause, the AFL-CIO emphasizes that this Court has specifically stated that elections are free and equal:

> when they are public and open to all qualified electors alike: when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the

> right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

AFL-CIO Brief at 20-21 (quoting *Winston v. Moore*, 91 A. 520 at 523 (Pa. 1914)). The AFL-CIO maintains that the unique history of these provisions demonstrates that they "provide heightened protections beyond any analogous provisions in the federal constitution," and, thus, provide a separate legal basis for finding the 2011 Plan unconstitutional. *Id.* at 4.

Amici Bernard Grofman, professor of political science at the University of California, and Keith Gaddie, professor of political science at the University of Oklahoma, echo the call of Petitioners, Executive Respondents, and other *amici* for this Court to act and provide a check on extreme partisan gerrymandering, highlighting its pernicious nature. Grofman and Gaddie also provide a suggested standard for assessing partisan gerrymandering cases, proposing that a partisan gerrymander is unconstitutional if each of the following three elements is shown: (1) partisan asymmetry, meaning the districting map had a "disparate impact on voters based on political affiliation," as measured by degree of partisan bias and mean-median gap, Grofman Gaddie Brief at 14; (2) lack of responsiveness of electoral outcomes to voters' decisions, meaning representation does not change despite a change in voter preference from one political party to another; and (3) causation, meaning intentional discrimination, rather than other, neutral causes, led to the asymmetry and lack of responsiveness. Grofman and Gaddie maintain that their standard is judicially manageable, as it can be applied by courts "coherently and consistently" across cases, and they urge this Court to adopt it. *Id.* at 36.

Also, as *amicus*, the American Civil Liberties Union ("ACLU") argues in support of Petitioners that the 2011 Plan violates the free expression and association clauses of

the Pennsylvania Constitution, asserting, consistent with Petitioners' position, that the Pennsylvania Constitution provides greater protections for these rights than does the First Amendment to the United States Constitution. The ACLU also notes the unique nature of the Pennsylvania Constitution's Free and Equal Elections Clause, which, it suggests, grants more robust protections for the right to vote than the federal Constitution. Further, as a matter of policy, the ACLU suggests that greater protections for speech, associational, and voting rights are consistent with the "marketplace of ideas" concept developed by Justice Oliver Wendell Holmes, which, the ACLU notes, highlights the importance of government viewpoint neutrality in maintaining the free exchange of ideas critical to our democracy, particularly where the electoral process is at stake. ACLU Brief at 6-9.

Similar to Petitioners, the ACLU maintains that extreme partisan gerrymandering is unconstitutional, explaining that unconstitutional partisan gerrymandering is "distinct from the inevitable incidental political considerations and partisan effects that may occur," *id.* at 22, and, instead, occurs when a state acts with an intent to "entrench" by drawing district "lines for the purpose of locking in partisan advantage regardless of the voters' likely choices." *Id.* at 22-23 (citing *Arizona State Legislature*, 135 S. Ct. at 2658). The ACLU suggests that such political entrenchment was present in the instant case, and it maintains that the General Assembly's deliberate effort to discriminate against minority-party voters triggers strict scrutiny, which the ACLU notes the Legislative Respondents have made no effort to satisfy. Thus, the ACLU argues that this Court should find the Plan violates the Pennsylvania Constitution.

Additionally, Political Science Professors,[58] the Pittsburgh Foundation,[59] and Campaign Legal Center have each filed *amicus curiae* briefs in support of Petitioners. These *amici* focus largely on the increasing prevalence of partisan gerrymandering occurring across the United States, which they attribute to sophisticated, ever-evolving technology which makes it more feasible than ever to gather specific data about voters and to utilize that data to "tailor durably biased maps." Political Science Professors' Brief at 12. These *amici* warn that instances of extreme partisan gerrymandering will only worsen as this technology continues to develop.

Turning to the 2011 Plan, these *amici* all agree that it represents a particularly egregious form of partisan gerrymandering. They suggest that the challenge to the Plan is justiciable under the Pennsylvania Constitution, and they assert that judicially manageable standards exist by which to assess the constitutionality of the Plan. More specifically, the Pittsburgh Foundation offers that a congressional redistricting plan is unconstitutional if it: "(1) was intentionally designed predominantly to attain a partisan result; (2) largely disregards traditional and accepted districting criteria; and (3) has been demonstrated (or is reliably predicted) to have an actual disparate and unfair impact on a substantial number of Pennsylvania voters." Pittsburgh Foundation Brief at

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[58] Political Science Professors identify themselves as "nationally recognized university research scholars and political scientists from some of the foremost academic institutions in Pennsylvania and from across the country whose collective studies on electoral behavior, voter identity, and redistricting in the United States have been published in leading scholarly journals and books." Political Science Professors' Brief at 1.

[59] The Pittsburgh Foundation is a non-profit organization which "works to improve the quality of life in the Pittsburgh region by evaluating and addressing community issues, promoting responsible philanthropy, and connecting donors to the critical needs of the community." The Pittsburgh Foundation, http://pittsburghfoundation.org (last visited Jan. 29, 2018).

13. Political Science Professors submit that courts should use computer simulations, as well as objective, social science measures, to assess a districting map's partisan bias, such as the efficiency gap and the mean-median difference. Lastly, Campaign Legal Center argues that this Court should adopt Petitioners' proposed standard.[60]

B. Legislative Respondents

We now turn to the arguments of the Legislative Respondents. They contend that districting legislation, such as the 2011 Plan at issue, does not implicate, let alone violate, free speech or associational rights because it "is not directed to voter speech or conduct." Legislative Respondents' Brief at 23. Rather, according to Legislative Respondents, the Plan creates "18 equipopulous districts," giving Petitioners' votes the same weight as other Pennsylvania voters and fully allowing Petitioners to participate in the political process by voting for the candidate of their choice and associating with any political party or candidate they so choose. *Id.*

Regarding Petitioners' reliance on cases involving laws which made speech less effective, Legislative Respondents suggest those decisions are inapplicable to the case at bar because they concern laws which actually restricted speech, whereas the Plan in the instant case allows Democrats to communicate as desired through such means as voting for their preferred candidates, joining the Democratic Party, contacting their representatives, and financially supporting causes they care about. Although Legislative Respondents concede that the Plan might make it more difficult for Petitioners to "persuade a majority of the other 705,000+ voters in their districts to agree with them on the candidate they prefer," *id.* at 25, they emphasize that Petitioners have no free speech or associational right to "an agreeable or more persuadable audience,"

[60] The application to file an amicus brief *nunc pro tunc*, filed by Concerned Citizens for Democracy, is granted.

id. at 26, citing a variety of federal cases holding that the redistricting plans challenged therein did not violate voters' First Amendment rights. *Id.* (citing, *e.g.*, *League of Women Voters v. Quinn*, No. 1:11-CV-5569, 2011 WL 5143044, *12-13 (N.D. Ill. Oct. 28, 2011); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp.2d 563, 575 (N.D. Ill. 2011)).

Moreover, relying on this Court's decision in *Holt v. 2011 Reapportionment Commission*, 67 A.3d 1211 (Pa. 2013) ("*Holt II*"), Legislative Respondents highlight the "inherently political" nature of redistricting, which, they note, this Court found constitutionally permissible. Legislative Respondents' Brief at 27 (quoting *Holt II,* 67 A.3d at 1234). Further, to the extent that Petitioners distinguish in their argument between permissible "political considerations" and what they deem impermissible "partisan intent," Respondents maintain that "the two concepts are inextricably intertwined," as "political parties are comprised of constituencies, which in part includes 'communities of interest' — what Petitioners argue is the 'good' side of 'political.'" *Id.* at 28. As such, Legislative Respondents contend that Petitioners' argument that no partisan considerations should be permitted during the redistricting process runs afoul of *Holt II* and necessarily must fail. They suggest that, to find otherwise, would allow any Pennsylvania voter to challenge, and potentially invalidate, a plan designed to protect an incumbent or to protect "communities of interest" — a "sweeping rule" that Respondents contend is not justified by the law, the facts, or public policy. *Id.* at 29-30.

Next, Respondents assert that Petitioners cannot satisfy the requirements of a retaliation claim. Relying upon the *Uniontown Newspapers* test, Legislative Respondents first argue that Petitioners fail to provide record evidence establishing that the 2011 Plan was enacted with a retaliatory motive to coerce Democratic voters into voting differently than they would otherwise vote. To the contrary, Respondents

maintain that no legislature would reasonably believe that gerrymandering would coerce voters to vote differently, and they further submit that the record demonstrates that the Plan was passed with bipartisan support, indicating the Plan was not drawn with a "dastardly motive." *Id.* at 31. Respondents also contend that Petitioners failed to prove that the Plan "chilled" a person from continuing to participate in the political process, as the evidence of record did not show a decrease in voter turnout or civil participation following the Plan's enactment. Lastly, Legislative Respondents highlight the fact that political gerrymandering is not typically the type of government conduct associated with a case of retaliation; rather, Respondents note that retaliation claims typically involve overt actions intended to invoke fear in the target, such as police intimidation tactics or organized harassment campaigns.

Next, Legislative Respondents assert that Petitioners failed to prove that the 2011 Plan violated the equal protection and Free and Equal Elections clauses of the Pennsylvania Constitution. Relying upon *Erfer*, Respondents contend that Petitioners produced no evidence that the Plan was designed to intentionally discriminate against Democratic voters, emphasizing the bipartisan manner in which the Plan was adopted, and claiming that Petitioners' statistical data does not account for the various non-partisan factors considered in drawing the Plan, such as preserving the core of existing districts, preserving communities of interest, and protecting incumbents. Respondents also suggest that Democratic voters do not constitute an "identifiable political group" because they encompass a wide range of people beyond those who belong to the Democratic Party, and because Pennsylvania voters frequently split their tickets between Democratic and Republican candidates, making it difficult to clearly identify a voter as solely "Democratic."

With respect to the second *Erfer* prong, Respondents maintain that Petitioners failed to establish that the Plan had a discriminatory effect on Democratic voters and, more specifically, failed to prove that the Plan resulted in a lack of political power which effectively shut out Democrats from the political process. Respondents argue that, contrary to Petitioners' assertions, this Court specifically found that merely voting for a political candidate who loses an election does not shut out a voter from the political process*, see Erfer*, 794 A.2d at 333, and they submit that, in any event, the five "safe" Democratic seats in the congressional delegation demonstrate that Democrats are not shut out. Respondents further observe that, although Petitioners suggest, due to congressional polarization, that Democrats' interests are not adequately represented by their congressmen, they fail to provide evidence substantiating this claim and fail to identify the interests of Democratic voters which allegedly are not represented in congress, particularly those Democrats who are "split ticket" voters.

Moreover, to the extent that Petitioners suggest that the second element of the *Erfer* test should be eliminated as unworkable, Respondents maintain that we should deny their request, claiming that Petitioners seek to eliminate that element because they are simply unable to meet it. Respondents further argue that, in advocating for the removal of the second element, Petitioners essentially are seeking a state constitutional right to proportional representation, which the United States Supreme Court expressly rejected in *Bandemer*. *See Bandemer*, 478 U.S. at 139. In any event, Respondents emphasize that Petitioners have not met their burden of establishing that this Court should depart from *Erfer* and the federal precedent upon which it relies, as the equal protection guarantees under the United States and Pennsylvania Constitutions are coterminous, and Petitioners do not suggest otherwise.

Respondents further assert that, even if this Court were to abandon the standard articulated in *Erfer*, Petitioners' claim would nevertheless fail because, pursuant to recent United States Supreme Court precedent, there is no judicially manageable standard by which to evaluate claims involving equal protection violations due to partisan gerrymandering. *See Vieth*, 541 U.S. at 292. Respondents observe that Petitioners do not attempt to offer a judicially manageable standard to apply in place of the *Erfer* standard, and they note that the standards proposed by *amici* are similarly unavailing, as they each are incompatible with each other.

Additionally, Legislative Respondents contend that policy considerations weigh heavily against this Court creating a new standard for evaluating partisan gerrymandering claims under Pennsylvania's equal protection clause, as they claim the legislature is uniquely competent to engage in redistricting, and judicial oversight in this area implicates separation-of-powers concerns. Respondents further suggest that there are a variety of positive elements to using political considerations in redistricting, including preserving "core constituencies" and incumbency, as well as the states' right to establish their districts in the manner they so choose. Moreover, Legislative Respondents highlight various checks on the state redistricting process, such as the "Make or Alter" provision of the federal Elections Clause of the United States Constitution,[61] the threat of political retaliation when the political tides turn, and, as in Pennsylvania, legislation which establishes a bi-partisan commission to draw district lines. Nevertheless, should this Court decide to select a new standard, Legislative Respondents submit that they should receive a new trial.

[61] See supra p. 5.

Legislative Respondents conclude by cautioning that this Court should not adopt legal criteria for redistricting beyond those in Pennsylvania's Constitution, claiming that doing so would infringe on the legislative function and run afoul of the federal Elections Clause. Accordingly, Respondents ask our Court to affirm the Commonwealth Court's decision and find that Petitioners did not demonstrate that the 2011 Plan clearly, plainly, and palpably violates the Constitution.

C. Intervenors

Intervenors — Republican voters, candidates for office, committee chairpersons, and other active members of the Republican Party — stress that they have invested substantial time, money, and effort in preparing for the upcoming election deadlines based upon the 2011 Plan, and they suggest that this Court should not require a new congressional map before the 2018 primaries, as it would be a "monumental task" to educate voters about changes in the congressional districts in time for the election. Intervenors' Brief at 17. Intervenors also highlight potential problems with overall voter confusion, as well as various challenges congressional candidates would face as a result of changes to the 2011 Plan during this election cycle, including potentially having to circulate new nomination petitions and having to direct their campaign activities to potentially new voters and demographics. While Executive Respondents maintain that the date of the primary could be extended, Intervenors contend that an extension imposed this late in the election cycle would "result in significant logistical challenges for county election administrators," as well as substantially increase the costs borne by state and county governments. *Id.* at 29. According to Intervenors, the above-described challenges would be particularly pronounced with respect to the special election for the 18th Congressional District, scheduled for March 13 of this year.

While Intervenors would find, based upon *Vieth*, that Petitioners have not shown that their partisan gerrymandering claims are justiciable, should this Court nevertheless find the claims justiciable and the 2011 Plan unconstitutional, they argue that we must give the legislature the first opportunity to correct the Plan, as ordering new districts without giving the legislature the chance to rectify any constitutional violations would raise separation-of-powers concerns. In doing so, Intervenors assert that our Court should follow the standard for relief that this Court endorsed in *Butcher v. Bloom*, 203 A.2d 556 (Pa. 1964), wherein, after finding that the state redistricting plan violated *Reynolds*, *supra*, our Court declined to order immediate redistricting in light of the "[s]erious disruption of orderly state election processes and basic governmental functions" that would result from the Court's immediate action. Intervenors' Brief at 17 (quoting *Butcher*, 203 A.2d at 568). Instead, Intervenors note this Court opted to leave the plan in place until after the upcoming election so as to allow the legislature to have a "reasonable opportunity to enact new reapportionment legislation," giving the legislature almost a full year to do so. *Id.* at 23 (quoting *Butcher*, 203 A.2d at 569).

Claiming that the same concerns in *Butcher* are present in the instant case, Intervenors submit that we should likewise give the legislature a reasonable and adequate time in which to correct the Plan, which they suggest could be in place for the 2020 elections. Further counseling against the immediate remedying of the 2011 Plan's constitutional deficiencies, Intervenors highlight the fact that Petitioners, without explanation, waited three election cycles (almost seven years) to bring their claims, indicating that any constitutional issues are not pressing. Intervenors also cite the United States Supreme Court's pending decision in *Gill*, which they note may impact the resolution of this case.

V. Analysis

We begin our analysis of the challenge to the 2011 Plan with the presumption that the General Assembly did not intend to violate the Pennsylvania Constitution, "in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths." *Stilp v. Commonwealth*, 905 A.2d 918, 938-39 (Pa. 2006); *see also* 1 Pa.C.S. § 1922(3). Accordingly, a statute is presumed to be valid, and will be declared unconstitutional only if the challenging parties carry the heavy burden of proof that the enactment "clearly, palpably, and plainly violates the Constitution." *See West Mifflin Area School District v. Zahorchak,* 4 A.3d 1042, 1048 (Pa. 2010).

Upon review,[62] and for the following reasons, we are persuaded by Petitioners and the other presentations before us that the 2011 Plan clearly, plainly, and palpably violates the Free and Equal Elections Clause of our Constitution.[63]

A. Free and Equal Elections Clause

Pennsylvania's Constitution, when adopted in 1776, was widely viewed as "the most radically democratic of all the early state constitutions." Ken Gormley, "Overview of Pennsylvania Constitutional Law," as appearing in Ken Gormley, ed., *The Pennsylvania Constitution A Treatise on Rights and Liberties*, 3 (2004). Indeed, our Constitution, which was adopted over a full decade before the United States Constitution, served as the foundation — the template — for the federal charter. *Id*. Our autonomous state Constitution, rather than a "reaction" to federal constitutional

[62] Given that this case is before us following our grant of extraordinary jurisdiction, our standard of review is *de novo*. Further, although the findings of fact made by Judge Brobson are not binding on this Court, "we will afford them due consideration, as the jurist who presided over the hearings was in the best position to determine the facts." *Annenberg v. Commonwealth*, 757 A.2d 338, 343 (Pa. 2000) (citations omitted).

[63] Given that we base our decision on the Free and Equal Elections Clause, we need not address the free expression or equal protection arguments advanced by Petitioners.

jurisprudence, stands as a self-contained and self-governing body of constitutional law, and acts as a wholly independent protector of the rights of the citizens of our Commonwealth.

The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself. *Ieropoli v. AC & S Corp.*, 842 A.2d 919, 925 (Pa. 2004). "[T]he Constitution's language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Id.* In doing so, reading the provisions of the Constitution in any "strained or technical manner" is to be avoided. *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008). Consistent therewith, "we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter." *Commonwealth ex rel. Paulinski v. Isaac*, 397 A.2d 760, 766 (Pa. 1979).

Further, if, in the process of undertaking explication of a provision of the Pennsylvania Constitution, any ambiguity becomes apparent in the plain language of the provision, we follow the rules of interpretation similar to those generally applicable when construing statutes. *See, e.g., Robinson Township v. Commonwealth*, 83 A.3d 901, 945 (Pa. 2013); *Commonwealth v. Omar*, 981 A.2d 179, 185 (Pa. 2009). If the constitutional language is clear and explicit, we will not "delimit the meaning of the words used by reference to a supposed intent." *Robinson Township*, 83 A.3d at 945 (quoting *Commonwealth ex rel. MacCallum v. Acker*, 162 A. 159, 160 (Pa. 1932)). If the words of a constitutional provision are not explicit, we may resort to considerations other than the plain language to discern intent, including, in this context, the occasion and necessity for the provision; the circumstances under which the amendment was ratified; the mischief to be remedied; the object to be attained; and the contemporaneous

legislative history. 1 Pa.C.S. §§ 1921, 1922; *accord* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 Okla. City U. L. Rev. 189, 195 & 200 (2002) (state constitutions, ratified by electorate, are characterized as "voice of the people," which invites inquiry into "common understanding" of provision; relevant considerations include constitutional convention debates that reflect collective intent of body, circumstances leading to adoption of provision, and purpose sought to be accomplished).

Moreover, the Free and Equal Elections Clause has no federal counterpart, and, thus, our seminal comparative review standard described in *Commonwealth v. Edmunds*, *supra*, is not directly applicable.[64] Nonetheless, certain of the *Edmunds* factors obviously may assist us in our analysis. *Jubelirer*, 953 A.2d at 524-25; *Edmunds*, 586 A.2d at 895. Indeed, we have recently employed certain of these factors when analyzing the Environmental Rights Amendment. *See Robinson Township* 83 A.3d at 944 ("The Environmental Rights Amendment has no counterpart in the federal charter and, as a result, the seminal, comparative review standard described in [*Edmunds*] is not strictly applicable here. Nonetheless, some of the *Edmunds* factors obviously are helpful in our analysis."). Thus, in addition to our analysis of the plain language, we may consider, as necessary, any relevant decisional law and policy considerations argued by the parties, and any extra-jurisdictional case law from states that have identical or similar provisions, which may be helpful and persuasive. *See Jubelirer,* 953 A.2d at 525 n.12.

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[64] As noted above, our landmark decision in *Edmunds,* our Court set forth a four-part test which we routinely follow in examining and interpreting a provision of our Commonwealth's organic charter. This test examines (1) the relevant text of the provision of Pennsylvania Constitution; (2) the history of the provision, including Pennsylvania case law; (3) relevant case law from other jurisdictions interpreting similar provisions of that jurisdiction's constitution; and (4) policy considerations.

Finally, we emphasize that Article I is the Commonwealth's Declaration of Rights, which spells out the social contract between government and the people which is of such "general, great and essential" quality as to be ensconced as "inviolate." Pa. Const. art. I, Preamble & § 25; *see also* Pa. Const. art. I, § 2 ("All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness."). Although plenary, the General Assembly's police power is not absolute, as legislative power is subject to restrictions enumerated in the Constitution and to limitations inherent in the form of government chosen by the people of this Commonwealth. *See* Pa. Const. art. III, §§ 28-32 (enumerating restrictions). Specifically, under our Constitution, the people have delegated general power to the General Assembly, with the express exception of certain fundamental rights reserved to the people in Article I of our Constitution. *See* Pa. Const. art. I, § 25 ("[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate."); *see generally Robinson Township*, 83 A.3d at 946-48.

Thus, with this context in hand, we begin with the actual language of Article I, Section 5.

1. Language

Article I, Section 5 of the Pennsylvania Constitution, entitled "Elections," is contained within the Pennsylvania Constitution's "Declaration of Rights," which, as noted above, is an enumeration of the fundamental individual human rights possessed by the people of this Commonwealth that are specifically exempted from the powers of Commonwealth government to diminish.[65] As noted above, this section provides:

[65] *See* Pa. Const. art. I, § 25 ("To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.").

> Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Pa. Const. art. I, § 5. This clause first appeared, albeit in different form, in our Commonwealth's first organic charter of governance adopted in 1776, 11 years before the United States Constitution was adopted. By contrast, the United States Constitution – which furnishes no explicit protections for an individual's electoral rights, nor sets any minimum standards for a state's conduct of the electoral process – does not contain, nor has it ever contained, an analogous provision. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 100 (2014) (observing that "the U.S. Constitution does not grant the right to vote. It instead defines the right through a negative gloss, detailing the various reasons states cannot limit the franchise.").

The broad text of the first clause of this provision mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be "free and equal." In accordance with the plain and expansive sweep of the words "free and equal," we view them as indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government. Thus, Article I, Section 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way, the actual and plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation. This interpretation is consistent with both the historical reasons for the inclusion of this provision in our Commonwealth's Constitution and the meaning we have ascribed to it through our case law.

2. History

Our Commonwealth's centuries-old and unique history has influenced the evolution of the text of the Free and Equal Elections Clause, as well as our Court's interpretation of that provision. Although the general character of our Commonwealth during the colonial era was reflective of the fundamental desire of Pennsylvania's founder, William Penn, that it be a haven of tolerance and non-discrimination for adherents of various religious beliefs, the manner in which the colony was governed from its inception nevertheless excluded certain groups from participation in its official government. Roman Catholics, for example, could not hold office in the colony from 1693 to 1776, due to the requirement in the Charter of Privileges, a precursor to our Constitution in which Penn set forth the manner of governance for the colony,[66] that every candidate for office was required to swear "that he did not believe in the doctrine of transubstantiation, that he regarded the invocation of the Virgin Mary and the saints as superstitious and the Popish Mass as idolatrous." J. Paul Selsam, *The Pennsylvania Constitution of 1776*, 179 (1971). Thus, although successive waves of European immigrants were attracted to the Pennsylvania colony after its founding by the promise of religious tolerance, not every group which settled in Pennsylvania was afforded the equal legal right to participate in its governance. Related thereto, the colony became divided over time by the geographical areas in which these immigrants settled, as well as their religious beliefs.

English and Quaker immigrants fleeing persecution in England were the first to arrive and settled in the eastern part of the colony in and around the City of Philadelphia and in Chester and Bucks Counties. German immigrants arrived thereafter in sizable

[66] *William Penn Sch. Dist.,* 170 A.3d at 418–19.

numbers and settled primarily in the central and northeastern part of the colony, and finally came a large influx of Scots-Irish Presbyterians who lived primarily in the interior and frontier regions of the colony: first in Lancaster, York and Cumberland Counties, and then expanding westward to the areas beyond the Allegheny mountains, congregating in and near the settlement which became modern day Pittsburgh. *Id*. at 4-5.

These groups were divided along economic and religious lines. The English and Quakers who engaged in extensive commerce and banking became the most wealthy and aristocratic elements in the colony. *Id.* at 6. German immigrants reaped a comfortable living from farming the fertile lands of their settlement. Rosalind Branning, *Pennsylvania Constitutional Development*, 10 (1960). The Scots-Irish, who occupied the frontier regions, eked out an existence through hunting, trapping, and subsistence farming; however, they also became skilled tradesmen, highly proficient in construction, masonry, and ironworking, and began to be described as "the leather aprons," which, although intended as a pejorative by members of the colony's aristocracy, they proudly adopted as a badge of honor reflective of their considerable skills and abilities in their chosen professions. Robert Brunhouse, *The Counter-Revolution in Pennsylvania* 1776-1790, 16 (1942).

These various groups began to align themselves into nascent political factions which, by the 1760s, exerted varying degrees of control over the colonial government. The eastern Presbyterian adherents formed a group known as "the Proprietary Party," so named because of their faithfulness to the tenets of William Penn's religious and political philosophy, and they were joined by the Anglicans who had also settled in the Philadelphia region. The Quakers, disillusioned by Penn's embrace of the Anglican faith, united with German pietistic religious sects to form a party known as the Quaker or

"Anti-Proprietary Party." Selsam at 6-7; Branning, at 10. The Scots-Irish, who were angry at having their pleas for assistance during the French and Indian War ignored by the colonial assembly, which was dominated by the Proprietary Party, aligned with the Anti-Proprietary party as a means of achieving their goal of fair representation in the assembly. Branning at 10.

Although these political alliances remained intact until the early 1770s, they began to unravel with the tensions occasioned by the general colonial revulsion at the heavy-handed tactics of the British Crown — *e.g.*, the imposition of the Stamp Act and the use of writs of assistance to enforce the Revenue Act — which ultimately culminated in the Revolutionary War. The Quakers and the Anglicans remained loyal to the British Crown as these tensions rose. However, the Scots-Irish in the western region, who dominated the Anti-Proprietary Party, were strongly supportive of the cause of the opponents of the crown, and they began to demand reforms be made by the colonial assembly, controlled by the Proprietary Party, including reapportionment of representation to the west. *Id.* at 11. They were joined in this effort by a large segment of the working-class population of the City of Philadelphia, disenfranchised by the requirement of the Charter of Privileges that imposed a property ownership requirement for the right to vote. This, coupled with the Charter's restriction of representation in the assembly to counties, resulted in the underrepresentation of the City of Philadelphia in colonial affairs, as well as the denial of representation to the western region due to the assembly's deliberately slow pace in recognizing new counties in that area. *Id.* Thus, by the early 1700s, colonial government remained dominated by the counties of Philadelphia, Chester, and Bucks, even though they had been eclipsed in population by the western regions of the colony and the City of Philadelphia. Selsam at 31-33. Although, in an effort to placate these groups, the assembly granted a concession by

giving the west 28 seats in the assembly, while retaining 30 for the east, this did little to mollify the fervor of these groups for further reform. Branning at 11.

The opportunity for such reform arose with the formal adoption of the Declaration of Independence by the Continental Congress in 1776. This same Congress also adopted a resolution suggesting that the colonies adopt constitutions in the event that they had "no government sufficient to the exigencies of their affairs." *Id.* at 12. For the Pennsylvania colony, this was the catalyst which enabled the reformers from the western regions and the City of Philadelphia, who were now known as "the radicals," to achieve the calling of a constitutional convention. This convention, which was presided over by Benjamin Franklin, who also was serving at the same time in the Continental Congress, adopted our Commonwealth's Constitution of 1776, which, for its time, was considered very forward thinking. *Id.* at 13. Many of its provisions reflected the prevailing sentiment of the radical delegates from the frontier and the City of Philadelphia for a devolution of centralized political power from the hands of a very few, in order to form a government more directly responsive to the needs of the people. Thus, it adopted a unicameral legislature on the belief that bicameral legislatures with one house dominated by elites who were elected on the basis of monetary or property qualifications would thwart the will of the people, as expressed through their representatives in the lower chamber, whose members were elected by those whose right of suffrage was not similarly constrained. Joseph S. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789-1790*, 123 Pennsylvania J. of History, Vol. 59, No. 2 (April 1992). Even though concerned with foundational matters such as the structure of government, the delegates, in response to their experience of being excluded from participation in the colonial government, included

two explicit provisions to establish protections of the right of the people to fair and equal representation in the governance of their affairs.

The first requirement was that representation be proportional to population and that reapportionment of legislative seats be done every seven years. *See* Pa. Const. of 1776, art. I, § IV. As noted by one commentator, this was the direct product of the personal history of the majority of the delegates, and the requirement of equal representation was, thus, intended to protect future individuals against the exclusion from the legislative process "by persons who gained power and intended to keep it." John L. Gedid, "*History of the Pennsylvania Constitution"* as appearing in Ken Gormley, ed., "*The Pennsylvania Constitution A Treatise on Rights and Liberties*, 48 (2004).

Concomitant with this requirement, the delegates also deliberately incorporated into that Constitution the Declaration of Rights – which they considered to be an integral part of its framework – and therein the first version of Article I, Section 5, which declared that "all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office." Pa. Const. of 1776, art. I, § VII.

This section reflected the delegates' desire to secure access to the election process by all people with an interest in the communities in which they lived — universal suffrage — by prohibiting exclusion from the election process of those without property or financial means. It, thus, established a critical "leveling" protection in an effort to establish the uniform right of the people of this Commonwealth to select their representatives in government. It sought to ensure that this right of the people would forever remain equal no matter their financial situation or social class. Gedid, at 51; *see also* Selsam, at 190 ("The long struggle by the people for the control of their affairs was finally rewarded.").

Opposition to the new Constitution arose almost immediately, driven chiefly by the Quakers, Episcopalians, and Germans who had not fought in the Revolution, and the commercial interests in the City of Philadelphia. Branning at 17. These groups felt excluded from participation in the new government just as the factions who had written the 1776 Constitution previously did. Moreover, significant resentment grew over the increasing political power and attainment of elected office by those of lower socioeconomic status in the period after 1776. The social and commercial aristocracy of the Commonwealth resented the acquisition of political control of state government by the "leather aprons." Brunhouse at 16. Further, the exclusion of some of the population through the requirement of "test oaths" in the 1776 Constitution, which required all voters, candidates for office, and office holders to swear allegiance to uphold the new frame of government, further alienated those groups, chiefly from the eastern part of the state, for whom such oaths violated their religious beliefs. *Id.* These groups united and became known as the "Anti-Constitutionalists," and later by the designation Republicans and, later still, Federalists.[67] Supporters of the new charter of governance were allied into a political faction known as the Constitutionalists.

The strife between these two groups, and deficiencies in the structure of the new government — *i.e.*, the lack of a strong executive and an ill-defined role for a putative executive body created by the 1776 Constitution and given power over the legislature, the Council of Censors — rapidly intensified, such that the Commonwealth's government became paralyzed by dysfunction, so much so that the Continental Congress threatened to take it over. Gedid, at 52. These two factions vied for control

[67] As utilized in this history, this designation referred only to their views on the proper structure of governance, and does not refer to the modern Republican Party which came into being 60 years later. Gedid, at 52.

of the Council of Censors and the General Assembly throughout the late 1770s and 1780s. The Republicans, though well represented on the Council of Censors, could not garner the necessary votes to call a constitutional convention under its rules. However, popular dissatisfaction with the chaotic state of the Commonwealth's governance grew to such a degree that the Republicans gained control of the General Assembly in 1788, and, in November 1789, they passed legislation to call a constitutional convention. Branning, at 19.

Although there was some opposition to the calling of the convention by the Constitutionalists, given that the 1776 Constitution contained no explicit authorization for the assembly to do so, they, nevertheless, agreed to participate in the convention which began on November 24, 1789. Rather than continuing the internecine strife that had continually threatened the new Commonwealth's government, the leaders of the Constitutionalists, who were prominent political leaders with deep experience serving in the Commonwealth government, such as William Findley, forged what was regarded as an unexpected alliance with powerful members of the leadership of the Republicans, particularly James Wilson. Foster, at 128-29. The coalition of delegates shepherded by Findley and Wilson in producing a new Constitution was remarkable, given the regional and ideological strife which had preceded the convention. Its members represented 16 of the state's 21 counties, and they came from widely divergent geographic regions of the Commonwealth, ranging from Northampton County in the northeastern region of the state to Allegheny and Washington counties in the west. These delegates thus represented a wide spectrum of people with diverse political, ideological, and religious views. *Id*. at 131. Their work yielded a Constitution which, while making the structural reforms to the Commonwealth's government favored by the Republicans, such as the adoption of a bicameral legislature and the creation of the office of chief executive with

veto power over legislation, also preserved the principle cherished most by the Constitutionalists – namely, popular elections in which the people's right to elect their representatives in government would be equally available to all, and would, hereinafter, not be intentionally diminished by laws that discriminated against a voter based on his social or economic status, geography of his residence, or his religious and political beliefs. *Id*. at 137-38.

Consequently, popular election of representatives was maintained by the new Constitution, and applicable in all elections for both houses of the bicameral legislature. Importantly, consistent with the evident desire of the delegates to neutralize the factors which had formerly given rise to such rancorous division amongst the people in the selection of their representatives, the language of Article I, Section 5 was revised to remove all prior ambiguous qualifying language. In its place, the delegates adopted the present language of the first clause of Article I, Section 5, which has remained unchanged to this day by the people of this Commonwealth.[68] It states, simply and plainly, that "elections shall be free and equal."[69]

When viewed against the backdrop of the intense and seemingly unending regional, ideological, and sectarian strife detailed above, which bitterly divided the people of various regions of our state, this provision must be understood then as a salutary effort by the learned delegates to the 1790 convention to end, once and for all,

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[68] The 1790 Constitution was never ratified by popular vote; however, all subsequent constitutions in which this language is included have been ratified by the people of the Commonwealth.

[69] Indeed, the majority of delegates expressly rejected a proposal to remove the "and equal" language from the revised amendment. Minutes of the Constitutional Convention of 1789 at 377. Ours, thus, became the first constitution to utilize this language, and other states such as Delaware, following our lead, adopted the same language into their constitution a mere two years later in 1792. Eleven other states since then have included a "free and equal" clause in their constitutions.

the primary cause of popular dissatisfaction which undermined the governance of Pennsylvania: namely, the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered. These historical motivations of the framers have undergirded our Court's interpretation of the Free and Equal Elections Clause throughout the years since its inclusion in our Constitution.

3. Pennsylvania Case Law

As one noted commentator on the Pennsylvania Constitution, Charles Buckalew, himself a delegate to the 1873 Constitutional Convention, opined, given the aforementioned history, the words "free and equal" as used in Article I, Section 5 have a broad and wide sweep:

> They strike not only at privacy and partiality in popular elections, but also at corruption, compulsion, and other undue influences by which elections may be assailed; at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise, and at all its limitations, unproclaimed by the Constitution, upon the eligibility of the electors for office. And they exclude not only all invidious discriminations between individual electors, or classes of electors, but also between different sections or places in the State.

Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania. Exhibiting The Derivation and History of Its Several Provisions*, Article I at 10 (1883).

Our Court has ascribed the same expansive meaning to the terms "free and equal" in Article I, Section 5. Although our Court has infrequently relied on this provision to strike down acts of the legislature pertaining to the conduct of elections, the qualifications of voters to participate therein, or the creation of electoral districts, our view as to what constraints Article I, Section 5 places on the legislature in these areas

has been consistent over the years. Indeed, nearly 150 years ago, in considering a challenge to an act of the legislature establishing eligibility qualifications for electors to vote in all elections held in Philadelphia, and specifying the manner in which those elections are to be conducted, we recognized that, while our Constitution gives to the General Assembly the power to promulgate laws governing elections, those enactments are nonetheless subject to the requirements of the Free and Equal Elections Clause of our Constitution, and, hence, may be invalidated by our Court "in a case of plain, palpable and clear abuse of the power which actually infringes the rights of the electors." *Patterson*, 60 Pa. at 75.

In answering the question of how elections must be made equal, we stated: "Clearly by laws which shall arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth." *Id.* Thus, with this decision, our Court established that any legislative scheme which has the effect of impermissibly diluting the potency of an individual's vote for candidates for elective office relative to that of other voters will violate the guarantee of "free and equal" elections afforded by Article I, Section 5. *See City of Bethlehem*, 515 A.2d at 1323-24 (recognizing that a legislative enactment which "dilutes the vote of any segment of the constituency" will violate Article I, Section 5). This interpretation is wholly consonant with the intent of the framers of the 1790 Constitution to ensure that each voter will have an equally effective power to select the representative of his or her choice, free from any discrimination on the basis of his or her particular beliefs or views.

In the nearly 150 years since *Patterson*, our Court has not retreated from this interpretation of the Free and Equal Elections Clause. In 1914, our Court, in the case of *Winston, supra*, considered a challenge under the Free and Equal Elections Clause to

an act of the legislature which set standards regulating the nominations and elections for judges and elective offices in the City of Philadelphia. Although our Court ultimately ruled that the act did not violate this clause, we again reaffirmed that the clause protected a voter's individual right to an equal, nondiscriminatory electoral process. In describing the minimum requirements for "free and fair" elections, we stated:

> [E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Winston, 91 A. at 523.

We relied on these principles in the case of *In re New Britain Borough School District*, 145 A. 597 (Pa. 1929), to strike down the legislative creation of voting districts for elective office which, although not overtly depriving electors therein of their right to choose candidates for office secured by the Free and Equal Elections Clause, nevertheless operated to impair that right. In that case, the legislature created a new borough from parts of two existing townships and created a school district which overlapped the boundaries of the new borough. The new district, thus, encompassed part of the school district in each of the townships from which it was created. Pursuant to other acts of the legislature then in force, the court of common pleas of the county in which the district was situated, upon petition of taxpayers and electors in the newly created borough, appointed a board of school directors. The creation of the new school district was ultimately not approved as required by other legislation mandating the assent of the state board of elections for the creation of the district, and, thus, technically the residents of the new borough remained within their old school districts.

Residents of each of the former townships challenged the constitutionality of the effect of the combination of their former respective school districts under the Free and Equal Elections Clause, arguing that they had been deprived of their right to select school directors. Our Court agreed, and found that the residents of the two former school districts were effectively denied their right to elect representatives of their choosing to represent them on a body which would decide how their tax monies were spent. We noted that the residents of the newly created school district could not lawfully vote for representatives on the school boards of their prior districts, given that they were no longer legally residents thereof, and they also could not lawfully vote for school directors in the newly created school district, given that the ballot for every voter was required to be the same, and, because the new school district had not been approved, the two groups of borough residents would each have to be given separate ballots for their former districts. In our discussion of the Free and Equal Elections Clause, our Court emphasized that the rights protected by this provision may not be taken away by an act of the legislature, and that that body is prohibited by this clause from interfering with the exercise of those rights, even if the interference occurs by inadvertence. *Id.* at 599.

While it is true that our Court has not heretofore held that a redistricting plan violates the Free and Equal Elections Clause – for example, because it is the product of politically-motivated gerrymandering – we have never precluded such a claim in our jurisprudence. Our Court considered a challenge under Article I, Section 5 rooted in alleged political gerrymandering in the creation of state legislative districts in *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, *supra*. In that case, we entertained and rejected a claim that political gerrymandering operated to deny a candidate's claimed right to run for state legislative office under this provision. We found that the

individual's constitutionally protected right to run for state legislative office was protected by the redistricting plan, but concluded that right did not extend so far as to require that a reapportionment plan be tailored to allow him to challenge the incumbent of his choice.

More saliently, in *Erfer*, our Court specifically held that challenges to the enactment of a congressional redistricting plan predicated on claims of impermissible political gerrymandering may be brought under Article I, Section 5. Therein, we rebuffed the argument that Article I, Section 5 was limited in its scope of application to only elections of Commonwealth officials, inasmuch as there was nothing in the plain text of this provision which would so limit it. Likewise, our own review of the historical circumstances surrounding its inclusion in the 1790 Constitution, discussed above, supports our interpretation.

Moreover, in *Erfer*, we rejected the argument, advanced by Legislative Respondents in their post-argument filing seeking a stay of our Court's order of January 22, 2018,[70] that, because Article I, Section 4 of the United States Constitution confers on state legislatures the power to enact congressional redistricting plans, such plans are not subject to the requirements of the Pennsylvania Constitution:

> It is true that the U.S. Constitution has granted our legislature the power to craft congressional reapportionment plans. Yet, we see no indication that such a grant of power simultaneously suspended the constitution of our Commonwealth *vis à vis* congressional reapportionment. Without clear support for the radical conclusion that our Commonwealth's Constitution is nullified in challenges to congressional reapportionment plans, it would be highly inappropriate for us to circumscribe the operation of the organic legal document of our Commonwealth.

[70] *See supra* note 8.

Id. at 331.

Ultimately, in *Erfer*, we did not opine on whether, under our prior decisions interpreting Article I, Section 5, a congressional redistricting plan would be violative of the Free and Equal Elections Clause because of political gerrymandering. Although the petitioners in that case alleged that the redistricting plan at issue therein violated Article I, Section 5, our Court determined that they had not provided sufficient reasons for us to interpret our constitutional provision as furnishing additional protections of the right to vote beyond those recognized by the United States Supreme Court as conferred by the Equal Protection Clause of the United States Constitution. *See id.* at 332 ("Petitioners provide us with no persuasive argument as to why we should, at this juncture, interpret our constitution in such a fashion that the right to vote is more expansive than the guarantee found in the federal constitution."). Thus, we adjudicated the Article I, Section 5 challenge in that case solely on federal equal protection grounds, and rejected it, based on the test for such claims articulated by the plurality of the United States Supreme Court in *Bandemer, supra*.

Importantly, however, our Court in *Erfer* did not foreclose future challenges under Article I, Section 5 resting solely on independent state grounds. Indeed, the unique historical reasons discussed above, which were the genesis of Article I, Section 5, and its straightforward directive that "elections shall be free and equal" suggests such a separate analysis is warranted. The Free and Equal Elections Clause was specifically intended to equalize the power of voters in our Commonwealth's election process, and it explicitly confers this guarantee; by contrast, the Equal Protection Clause was added to the United States Constitution 78 years later with the ratification of the Fourteenth Amendment to address manifest legal inequities which were contributing causes of the

Civil War, and which persisted in its aftermath, and it contains no such unambiguous protections.

Moreover, and importantly, when properly presented with the argument, our Court entertains as distinct claims brought under the Free and Equal Elections Clause of our Constitution and the federal Equal Protection Clause, and we adjudicate them separately, utilizing the relevant Pennsylvania and federal standards. In *Shankey v. Staisey*, 257 A.2d 897 (Pa. 1969), a group of third-party voters challenged a Pennsylvania election statute which specified that, in order for an individual's vote for a third-party candidate for a particular office in the primary election to be counted, the total number of aggregate votes by third-party voters for that office had to equal or exceed the number of signatures required on a nominating petition to be listed on the ballot as a candidate for that office. The voters' challenge, which was brought under both the Free and Equal Elections Clause of the Pennsylvania Constitution and the Equal Protection Clause of the United States Constitution, alleged that these requirements wrongfully equated public petitions with ballots, thereby imposing a more stringent standard for their vote to be counted than that which voters casting ballots for major party candidates had to meet.

Our Court applied different constitutional standards in deciding these claims. In considering and rejecting the Article I, Section 5 claim – that the third-party candidates' right to vote was diminished because of these special requirements – our Court applied the interpretation of the Free and Equal Elections Clause set forth in *Winston*, *supra*, and ruled that, because the statute required major party candidates and third party candidates to demonstrate the same numerical level of voter support for their votes to be counted, the fact that this demonstration was made by ballot as opposed to by petition did not render the election process unequal. By contrast, in adjudicating the

equal protection claim, our Court utilized the test for an equal protection clause violation articulated by the United States Supreme Court and examined whether the statute served to impermissibly classify voters without a reasonable basis to do so.

Given the nature of the petitioners' argument in *Erfer*, which was founded on their apparent belief that the protections of Article I, Section 5 and Article 1, Section 26 were coextensive, our Court was not called upon, therein, to reassess the validity of the *Shankey* Court's use of a separate and distinct standard for adjudicating a claim that a particular legislative enactment involving the electoral process violates the Free and Equal Elections Clause, from that used to determine if the enactment violates the federal Equal Protection Clause. Thus, we reject Justice Mundy's assertion that *Erfer* requires us, under the principles of *stare decisis*, to utilize the same standard to adjudicate a claim of violation of the Free and Equal Elections Clause and the federal Equal Protection Clause. *See* Dissenting Opinion (Mundy, J.) at 2-3. To the extent that *Erfer* can be read for that proposition, we expressly disavow it, and presently reaffirm that, in accord with *Shankey* and the particular history of the Free and Equal Elections Clause, recounted above, the two distinct claims remain subject to entirely separate jurisprudential considerations.[71]

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[71] Like Pennsylvania, a number of other states go further than merely recognizing the right to vote, and provide additional and independent protections through provisions in their constitutions guaranteeing that their elections shall be "free and equal." Pa. Const. art. I, § 5. More specifically, the constitutions of twelve additional states contain election clauses identical to our charter, requiring elections to be "free and equal." These twelve other states are: Arizona, Ariz. Const. art. II, § 21; Arkansas, Ark. Const. art. 3, § 2; Delaware, Del. Const. art. I, § 3; Illinois, Ill. Const. art. III, § 3; Indiana, Ind. Const. art. 2, § 1; Kentucky, Ky. Const. § 6; Oklahoma, Okla. Const. art. III, § 5; Oregon, Or. Const. art. II, § 1; South Dakota, S.D. Const. art. VI, § 19; Tennessee, Tenn. Const. art. I, § 5; Washington, Wash. Const. art. I, § 19; and Wyoming, Wy. Const. art. I, § 27. While few have faced reapportionment challenges, state courts have breathed meaning into these unique constitutional provisions, a few of which are set forth below by way of example. Specifically, last year, the Court of Chancery of Delaware, in an in-depth treatment of Delaware's Constitution, much like that engaged in by our Court today, considered a (continued…)

4. Other Considerations

In addition to the occasion for the adoption of the Free and Equal Elections Clause, the circumstances in which the provision was adopted, the mischief to be remedied, and the object to be obtained, as described above, the consequences of a particular interpretation are also relevant in our analysis. Specifically, partisan gerrymandering dilutes the votes of those who in prior elections voted for the party not

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(…continued)
challenge to family-focused events at polling places on election day which induced parents of students to vote, but which operated as impediments to voting by the elderly and disabled. In concluding such conduct violated the Delaware Constitution's Elections Clause, the court reasoned that an election which provided a targeted group specific incentives to vote was neither free nor equal, noting the historical concerns in Delaware regarding the integrity of the election process. *Young v. Red Clay Consolidated School*, 159 A.3d 713, 758, 763 (Del. Ch. 2017).

Even more apt, two states, Illinois and Kentucky, have long traditions regarding the application and interpretation of their elections clauses. In an early Illinois decision, the Illinois Supreme Court, considering a challenge to a congressional apportionment statute, cited to the Illinois Constitution and concluded: "[a]n election is free where the voters are exposed to no intimidation or improper influence and where each voter is allowed to cast his ballot as his own conscience dictates. Elections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot." *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932). Similarly, in an early Kentucky decision involving the lack of printed ballots leaving numerous voters unable to exercise the franchise, that state's high court offered that "[t]he very purpose of elections is to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection; and when any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal, in the meaning of the [Kentucky] Constitution." *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915).

Thus, other states with identical constitutional provisions have considered and applied their elections clauses to a variety of election challenges, providing important protections for their voters. While those states whose constitutions have identical "free and equal" language to that of the Pennsylvania Constitution have not addressed the identical issue before us today, they, and other states, have been willing to consider and invigorate their provisions similarly, providing an equal right to each citizen, on par with every other citizen, to elect their representatives.

in power to give the party in power a lasting electoral advantage. By placing voters preferring one party's candidates in districts where their votes are wasted on candidates likely to lose (cracking), or by placing such voters in districts where their votes are cast for candidates destined to win (packing), the non-favored party's votes are diluted. It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation. This is the antithesis of a healthy representative democracy. Indeed, for our form of government to operate as intended, each and every Pennsylvania voter must have the same free and equal *opportunity* to select his or her representatives. As our foregoing discussion has illustrated, our Commonwealth's commitment to neutralizing factors which unfairly impede or dilute individuals' rights to select their representatives was borne of our forebears' bitter personal experience suffering the pernicious effects resulting from previous electoral schemes that sanctioned such discrimination. Furthermore, adoption of a broad interpretation guards against the risk of unfairly rendering votes nugatory, artificially entrenching representative power, and discouraging voters from participating in the electoral process because they have come to believe that the power of their individual vote has been diminished to the point that it "does not count." A broad and robust interpretation of Article I, Section 5 serves as a bulwark against the adverse consequences of partisan gerrymandering.

5. Conclusion

The above analysis of the Free and Equal Elections Clause – its plain language, its history, the occasion for the provision and the circumstances in which it was adopted, the case law interpreting this clause, and consideration of the consequences of our interpretation – leads us to conclude the Clause should be given the broadest interpretation, one which governs all aspects of the electoral process, and which

provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so.

B. Measurement of Compliance with Article I, Section 5

We turn now to the question of what measures should be utilized to assess a dilution claim under the Free and Equal Elections Clause of the Pennsylvania Constitution. Neither Article 1, Section 5, nor any other provision of our Constitution, articulates explicit standards which are to be used in the creation of congressional districts. However, since the inclusion of the Free and Equal Elections Clause in our Constitution in 1790, certain neutral criteria have, as a general matter, been traditionally utilized to guide the formation of our Commonwealth's legislative districts in order to prevent the dilution of an individual's vote for a representative in the General Assembly. These standards place the greatest emphasis on creating representational districts that both maintain the geographical and social cohesion of the communities in which people live and conduct the majority of their day-to-day affairs, and accord equal weight to the votes of residents in each of the various districts in determining the ultimate composition of the state legislature.

Significantly, the framers of the 1790 constitution who authored the Free and Equal Elections Clause also included a mandatory requirement therein for the legislature's formation of state senatorial districts covering multiple counties, namely that the counties must adjoin one another. Also, the architects of that charter expressly prohibited the division of any county of the Commonwealth, or the City of Philadelphia, in the formation of such districts. Pa. Const. of 1776, § 7. Thus, as preventing the dilution of an individual's vote was of paramount concern to that august group, it is evident that they considered maintaining the geographical contiguity of political

subdivisions, and barring the splitting thereof in the process of creating legislative districts, to afford important safeguards against that pernicious prospect.

In the eight-plus decades after the 1790 Constitution became our Commonwealth's fundamental plan of governance, many problems arose from the corruption of the political process by well-heeled special interest groups who rendered our representative democracy deeply dysfunctional by weakening the power of an individual's vote through, *inter alia*, their selection, and financial backing in the electoral process, of representatives who exclusively served their narrow interests and not those of the people as a whole. Gedid, *supra*, at 61-63. One of the methods by which the electoral process was manipulated by these interest groups to attain those objectives was the practice of gerrymandering, popular revulsion of which became one of the driving factors behind the populace's demand for the calling of the 1873 Constitutional Convention.

As noted by an eminent authority on Pennsylvania constitutional law, by the time of that convention, gerrymandering was regarded as "one of the most flagrant evils and scandals of the time, involving notorious wrong to the people and open disgrace to republican institutions." Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* 61 (1907). Although the delegates to that convention did not completely eliminate this practice through the charter of governance which they adopted, and which the voters subsequently approved, they nevertheless included significant protections against its occurrence through the explicit adoption of certain requirements which all state legislative districts were, thereafter, required to meet: (1) the population of such districts must be equal, to the extent possible; (2) the district that is created must be comprised of compact and contiguous geographical territory; and (3) the district respects the boundaries of existing political subdivisions contained therein, such that

the district divides as few of those subdivisions as possible. Pa. Const. of 1874, art. 2, § 16. Given the great concern of the delegates over the practice of gerrymandering occasioned by their recognition of the corrosive effects on our entire democratic process through the deliberate dilution of our citizenry's individual votes, the focus on these neutral factors must be viewed, then, as part of a broader effort by the delegates to that convention to establish "the best methods of representation to secure a just expression of the popular will." Branning at 59 (quoting Wayne Mac Veach, *Debates of the Convention to Amend the Constitution of Pennsylvania*, Volume I at 45 (1873)). Consequently, these factors have broader applicability beyond setting standards for the drawing of electoral districts for state legislative office.

The utility of these requirements to prevent vote dilution through gerrymandering retains continuing vitality, as evidenced by our present Constitution, adopted in 1968. In that charter, these basic requirements for the creation of senatorial districts were not only retained, but, indeed, were expanded by the voters to govern the establishment of election districts for the selection of their representatives in the state House of Representatives. Pa. Const., art. 2, § 16.

Because these factors are deeply rooted in the organic law of our Commonwealth, and continue to be the foundational requirements which state legislative districts must meet under the Pennsylvania Constitution, we find these neutral benchmarks to be particularly suitable as a measure in assessing whether a congressional districting plan dilutes the potency of an individual's ability to select the congressional representative of his or her choice, and thereby violates the Free and Equal Elections Clause. In our judgment, they are wholly consistent with the overarching intent of the framers of the 1790 Constitution that an individual's electoral power not be diminished through any law which discriminatorily dilutes the power of his

or her vote, and, thus, they are a measure by which to assess whether the guarantee to our citizenry of "free and equal" elections promised by Article, I Section 5 in the selection of their congressional representative has been violated. Because the character of these factors is fundamentally impartial in nature, their utilization reduces the likelihood of the creation of congressional districts which confer on any voter an unequal advantage by giving his or her vote greater weight in the selection of a congressional representative as prohibited by Article I, Section 5. Thus, use of these objective factors substantially reduces the risk that a voter in a particular congressional district will unfairly suffer the dilution of the power of his or her vote.

Moreover, rather than impermissibly lessening the power of an individual's vote based on the geographical area in which the individual resides – which, as explained above, Article I, Section 5 also prohibits – the use of compactness, contiguity, and the maintenance of the integrity of the boundaries of political subdivisions maintains the strength of an individual's vote in electing a congressional representative. When an individual is grouped with other members of his or her community in a congressional district for purposes of voting, the commonality of the interests shared with the other voters in the community increases the ability of the individual to elect a congressional representative for the district who reflects his or her personal preferences. This approach inures to no political party's benefit or detriment. It simply achieves the constitutional goal of fair and equal elections for all of our Commonwealth's voters. Finally, these standards also comport with the minimum requirements for congressional districts guaranteed by the United States Constitution, as interpreted by the United States Supreme Court. *See Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (holding that the plain objective of the United States Constitution is to make "equal representation for equal numbers of people the fundamental goal for the House of Representatives.").

Consequently, for all of these reasons, and as expressly set forth in our Order of January 22, 2018, we adopt these measures as appropriate in determining whether a congressional redistricting plan violates the Free and Equal Elections Clause of the Pennsylvania Constitution. Therefore, an essential part of such an inquiry is an examination of whether the congressional districts created under a redistricting plan are:

> composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.

Order, 1/22/19, at ¶ "Fourth."[72]

We recognize that other factors have historically played a role in the drawing of legislative districts, such as the preservation of prior district lines, protection of incumbents, or the maintenance of the political balance which existed after the prior reapportionment. *See*, *e.g.*, *Holt I,* 38 A.3d at 1235. However, we view these factors to be wholly subordinate to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts. These neutral criteria provide a "floor" of protection for an individual against the dilution of his or her vote in the creation of such districts.

When, however, it is demonstrated that, in the creation of congressional districts, these neutral criteria have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates Article I, Section 5 of the Pennsylvania Constitution. We note that, consistent with our prior interpretation of Article I, Section 5,

[72] Nothing herein is intended to suggest that congressional district maps must not also comply with federal law, and, most specifically, the Voting Rights Act, 52 U.S.C. § 10301.

see In re New Britain Borough School District, *supra*, this standard does not require a showing that the creators of congressional districts intentionally subordinated these traditional criteria to other considerations in the creation of the district in order for it to violate Article I, Section 5; rather, it is sufficient to establish a violation of this section to show that these traditional criteria were subordinated to other factors.

However, this is not the exclusive means by which a violation of Article I, Section 5 may be established. As we have repeatedly emphasized throughout our discussion, the overarching objective of this provision of our constitution is to prevent dilution of an individual's vote by mandating that the power of his or her vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens. We recognize, then, that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral "floor" criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative. *See* N.T. Trial, 12/13/17, at 839-42 (Dr. Warshaw discussing the concept of an efficiency gap based on the number of "wasted" votes for the minority political party under a particular redistricting plan). However, as the case at bar may be resolved solely on the basis of consideration of the degree to which neutral criteria were subordinated to the pursuit of partisan political advantage, as discussed below, we need not address at this juncture the possibility of such future claims.[73]

[73] In her dissenting opinion, Justice Mundy inexplicably contends that our allowance for the possibility that a *future* challenge to a *future* plan might show dilution even though the neutral redistricting criteria were adhered to "undermines the conclusion" that there is a violation *in this case*. Dissenting Opinion (Mundy, J.) at 3. However, as we state above, and as we discuss further below, assessment of those criteria fully, and solely, supports our conclusion in this case.

We are confident, however, that, technology can also be employed to aid in the expeditious development of districting maps, the boundaries of which are drawn to scrupulously adhere to neutral criteria. Indeed, as this Court highlighted in *Holt I*, "the development of computer technology appears to have substantially allayed the initial, extraordinary difficulties in" meeting such criteria. *Holt I*, 38 A.3d at 760; *see also id.* at 750 (noting that, since 1991, technology has provided tools allowing mapmakers to "achieve increasingly 'ideal' districts") (citing Gormley, Legislative Reapportionment, at 26–27, 45–47); *see also Larios v. Cox*, 305 F.Supp.2d. 1335, 1342 (N.D. Ga. 2004) ("given recent advances in computer technology, constitutional plans can be crafted in as short a period as one day"). As this Court views the record in this case, in the context of the computer technology of 2018, this thesis has clearly been proven.

C. Application to the 2011 Plan

Having established the means by which we measure a violation of Article I, Section 5, we now apply that measure to the 2011 Plan. Doing so, it is clear, plain, and palpable that the 2011 Plan subordinates the traditional redistricting criteria in the service of partisan advantage, and thereby deprives Petitioners of their state constitutional right to free and equal elections. *See West Mifflin Area School District,* 4 A.3d at 1048. Indeed, the compelling expert statistical evidence presented before the Commonwealth Court, in combination with and illustrated by an examination of the Plan itself and the remainder of the evidence presented below, demonstrates that the Plan cannot plausibly be directed at drawing equally populous, compact, and contiguous districts which divide political subdivisions only as necessary to ensure equal population.

Perhaps the most compelling evidence concerning the 2011 Plan derives from Dr. Chen's expert testimony. As detailed above, Dr. Chen created two sets of 500

computer-simulated Pennsylvania redistricting plans, the first of which – Simulated Set 1 – employed the traditional redistricting criteria of population equality, compactness, contiguousness, and political-subdivision integrity – *i.e.*, a simulation of the potential range of redistricting plans attempting to apply the traditional redistricting criteria. Dr. Chen's Simulated Set 1 plans achieved population equality and contiguity; had a range of Reock Compactness Scores from approximately .31 to .46, which was significantly more compact than the 2011 Plan's score of .278; and had a range of Popper-Polsby Compactness Scores from approximately .29 to .35, which was significantly more compact than the 2011 Plan's score of .164. Further, his simulated plans generally split between 12-14 counties and 40-58 municipalities, in sharp contrast to the 2011 Plan's far greater 28 county splits and 68 municipality splits. In other words, all of Dr. Chen's Simulated Set 1 plans, which were, again, a simulation of the potential range of redistricting plans attempting to apply the traditional redistricting criteria, were more compact and split fewer political subdivisions than the 2011 Plan, establishing that a process satisfying these traditional criteria would not lead to the 2011 Plan's adoption. Thus, Dr. Chen unsurprisingly opined that the 2011 Plan subordinated the goals of compactness and political-subdivision integrity to other considerations.[74] Dr. Chen's testimony in this regard establishes that the 2011 Plan did not primarily consider, much less endeavor to satisfy, the traditional redistricting criteria.[75]

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[74] Dr. Chen also credibly rebutted the notion that the 2011 Plan's outlier status derived from a hypothetical attempt to protect congressional incumbents – which attempt still, in any event, subordinated the traditional redistricting factors to others – or an attempt to establish the 2011 Plan's majority African-American district.

[75] Indeed, the advent of advanced technology and increased computing power underlying Dr. Chen's compelling analysis shows such technology need not be employed, as the record shows herein, for illicit partisan gerrymandering. As discussed above, such tools will, just as powerfully, aid the legislature in performing its redistricting function in comportment with traditional redistricting factors and their constituents' (continued…)

Dr. Chen's testimony in this regard comports with a lay examination of the Plan, which reveals tortuously drawn districts that cause plainly unnecessary political-subdivision splits. In terms of compactness, a rudimentary review reveals a map comprised of oddly shaped, sprawling districts which wander seemingly arbitrarily across Pennsylvania, leaving 28 counties, 68 political subdivisions, and numerous wards, divided among as many as five congressional districts, in their wakes. Significantly, these districts often rend municipalities from their surrounding metropolitan areas and quizzically divide small municipalities which could easily be incorporated into single districts without detriment to the traditional redistricting criteria. As Dr. Kennedy explained below, the 7th Congressional District, pictured above, has been referred to as resembling "Goofy kicking Donald Duck," and is perhaps chief among a number of rivals in this regard, ambling from Philadelphia's suburbs in central Montgomery County, where it borders four other districts, south into Delaware County, where it abuts a fifth, then west into Chester County, where it abuts another district and travels northwest before jutting out in both northerly and southerly directions into Berks and Lancaster Counties. Indeed, it is difficult to imagine how a district as Rorschachian and sprawling, which is contiguous in two locations only by virtue of a medical facility and a seafood/steakhouse, respectively, might plausibly be referred to as "compact." Moreover, in terms of political subdivision splits, the 7th Congressional District splits each of the five counties in its path and some 26 separate political subdivisions between multiple congressional districts. In other words, the 7th Congressional District is itself responsible for 17% of the 2011 Plan's county splits and 38% of its municipality splits.

(…continued)
constitutional rights, as well as aiding courts in their evaluations of whether the legislature satisfied its obligations in this regard.

The 7th Congressional District, however, is merely the starkest example of the 2011 Plan's overall composition. As pictured above, and as discussed below, many of the 2011 Plan's congressional districts similarly sprawl through Pennsylvania's landscape, often contain "isthmuses" and "tentacles," and almost entirely ignore the integrity of political subdivisions in their trajectories.[76] Although the 2011 Plan's odd shapes and seemingly arbitrary political subdivision splits are not themselves sufficient to conclude it is not predicated on the traditional redistricting factors, Dr. Chen's cogent analysis confirms that these anomalous shapes are neither necessary to, nor within the ordinary range of, plans generated with solicitude toward, applying traditional redistricting considerations.

The fact that the 2011 Plan cannot, as a statistical matter, be a plan directed at complying with traditional redistricting requirements is sufficient to establish that it violates the Free and Equal Elections Clause. Nevertheless, we acknowledge the multitude of evidence introduced in the Commonwealth Court showing that its deviation from these traditional requirements was in service of, and effectively works to, the unfair partisan advantage of Republican candidates in future congressional elections and, conversely, dilutes Petitioners' power to vote for congressional representatives who represent their views. Dr. Chen explained that, while his simulated plans created a range of up to 10 safe Republican districts with a mean-median vote gap of 0 to 4%, the 2011 Plan creates 13 safe Republican districts with a mean-median vote gap of 5.9%.

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[76] Indeed, the bulk of the 2011 Plan's districts make then-Massachusetts Governor Elbridge Gerry's eponymous 1812 partisan redistricting plan, criticized at the time for its salamander-like appearance – hence, "Gerry-mander" – and designed to dilute extant Federalist political power, appear relatively benign in comparison. *See generally* Jennifer Davis, "Elbridge Gerry and the Monstrous Gerrymander," https://blogs.loc.gov/law/2017/02/elbridge-gerry-and-the-monstrous-gerrymander (Feb. 10, 2017).

Dr. Chen also credibly rejected the notion that the 2011 Plan's outlier status in this regard was attributable to an attempt to account for Pennsylvania's political geography, to protect incumbent congresspersons, or to establish the 2011 Plan's majority-African American district. Indeed, he explicitly concluded that the traditional redistricting criteria were jettisoned in favor of unfair partisan gain. Dr. Warshaw's testimony similarly detailed how the 2011 Plan not only preserves the modest natural advantage, or vote efficiency gap, in favor of Republican congressional candidates relative to Republicans' statewide vote share – which owes to the fact that historically Democratic voters tend to self-sort into metropolitan areas and which he testified, until the 2011 Plan, was "never far from zero" percent – but also creates districts that increase that advantage to between 15 to 24% relative to statewide vote share. In other words, in its disregard of the traditional redistricting factors, the 2011 Plan consistently works toward and accomplishes the concentration of the power of historically-Republican voters and, conversely, the corresponding dilution of Petitioners' power to elect their chosen representatives.

Indeed, these statistical analyses are illustrated to some degree by Dr. Kennedy's discussion of the 2011 Plan's particulars. Dr. Kennedy, for example, explained that, at the district-by-district level, the 2011 Plan's geospatial oddities and divisions of political subdivisions and their wards effectively serve to establish a few overwhelmingly Democratic districts and a large majority of less strong, but nevertheless likely Republican districts. For example, the 1st Congressional District, beginning in Northeast Philadelphia and largely tracking the Delaware River, occasionally reaches "tentacles" inland, incorporating Chester, Swarthmore, and other

historically Democratic regions.[77] Contrariwise, although the 3rd Congressional District formerly contained traditionally-Democratic Erie County in its entirety, the 2011 Plan's 3rd and 5th Congressional Districts now divide that constituency, making both districts likely to elect Republican candidates.[78] Additionally, it is notable that the 2011 Plan's accommodation for Pennsylvania's loss of one congressional seat took the form of redrawing its 12th Congressional District, a 120-mile-long district that abuts four others and pitted two Democratic incumbent congressmen against one another in the next cycle's primary election, after which the victor of that contest lost to a Republican candidate who gleaned 51.2% of the general election vote. These geographic idiosyncrasies, the evidentiary record shows, served to strengthen the votes of voters inclined to vote for Republicans in congressional races and weaken those inclined to vote for Democrats.

In sum, we conclude that the evidence detailed above and the remaining evidence of the record as a whole demonstrates that Petitioners have established that the 2011 Plan subordinates the traditional redistricting criteria in service of achieving unfair partisan advantage, and, thus, violates the Free and Equal Elections Clause of the Pennsylvania Constitution. Such a plan, aimed at achieving unfair partisan gain, undermines voters' ability to exercise their right to vote in free and "equal" elections if the term is to be interpreted in any credible way.

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[77] Notably, in the last three congressional elections, voters in the 1st Congressional District elected a Democratic candidate with 84.9%, 82.8%, and 82.2% of the vote, respectively.

[78] In the 2012 and 2014 congressional elections, voters in the 3rd Congressional District elected a Republican candidate with 57.1% and 60.6% of the vote, respectively, and, by 2016, the Republican candidate ran unopposed.

An election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not "free and equal." In such circumstances, a "power, civil or military," to wit, the General Assembly, has in fact "interfere[d] to prevent the free exercise of the right of suffrage." Pa. Const. art. 1, § 5.

VI. Remedy

Having set forth why the 2011 Plan is constitutionally infirm, we turn to our January 22, 2018 Order which directed a remedy for the illegal plan. Therein, our Court initially invited our sister branches – the legislative and executive branches – to take action, through the enactment of a remedial congressional districting plan; however, recognizing the possibility that the legislature and executive would be unwilling or unable to act, we indicated in our Order that, in that eventuality, we would fashion a judicial remedial plan:

> Second, should the Pennsylvania General Assembly choose to submit a congressional districting plan that satisfies the requirements of the Pennsylvania Constitution, it shall submit such plan for consideration by the Governor on or before **February 9, 2018**. If the Governor accepts the General Assembly's congressional districting plan, it shall be submitted to this Court on or before **February 15, 2018**.
>
> Third, should the General Assembly not submit a congressional districting plan on or before **February 9, 2018**, or should the Governor not approve the General Assembly's plan on or before **February 15, 2018**, this Court shall proceed expeditiously to adopt a plan based on the evidentiary record developed in the Commonwealth Court. In anticipation of that eventuality, the parties shall have the opportunity to be heard; to wit, all parties and intervenors may submit to the Court proposed remedial districting plans on or before **February 15, 2018**.

Order, 1/22/18, at ¶¶ "Second" and "Third."

As to the initial and preferred path of legislative and executive action, we note that the primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature. *See* U.S. Const. art. I, § 4; *Butcher,* 216 A.2d at 458 ("[W]e considered it appropriate that the Legislature, the organ of government with the primary responsibility for the task of reapportionment, be afforded an additional opportunity to enact a constitutional reapportionment plan."); *Growe v. Emison*, 507 U.S. 25, 34 (1993) (stating that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts"); *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978); *Reynolds*, 377 U.S. at 586. Thus, in recognizing this foundational tenet, but also considering both the constitutionally infirm districting plan and the imminent approaching primary elections for 2018, we requested that these sister branches enact legislation regarding a new districting plan, providing a deadline to do so approximately three weeks from the date of our Order. Indeed, if the legislature and executive timely enact a remedial plan and submit it to our Court, our role in this matter concludes, unless and until the constitutionality of the new plan is challenged.

When, however, the legislature is unable or chooses not to act, it becomes the judiciary's role to determine the appropriate redistricting plan. Specifically, while statutes are cloaked with the presumption of constitutionality, it is the duty of this Court, as a co-equal branch of government, to declare, when appropriate, certain acts unconstitutional. Indeed, matters concerning the proper interpretation and application of our Commonwealth's organic charter are at the end of the day for this Court — and only this Court. *Pap's II*, 812 A.2d at 611 (noting Supreme Court has final word on meaning of Pennsylvania Constitution). Further, our Court possesses broad authority to craft

meaningful remedies when required. Pa. Const. art. V, §§ 1, 2, 10; 42 Pa.C.S. § 726 (granting power to "enter a final order or otherwise cause right and justice to be done").

Thus, as an alternative to the preferable legislative route for creating a remedial redistricting plan, in our Order, we considered the possibility that the legislature and Governor would not agree upon legislation providing for a remedial plan, and, thus, we allowed for the prospect of a judicially-imposed remedial plan. Our narrowly crafted contingency, which afforded all parties and Intervenors a full and fair opportunity to submit proposed remedial plans for our consideration, was well within our judicial authority, and supported by not only our Constitution and statutes as noted above, but by Commonwealth and federal precedent, as well as similar remedies provided by the high courts of other states acting when their sister branches fail to remedy an unconstitutional plan.

Perhaps the clearest balancing of the legislature's primary role in districting against the court's ultimate obligation to ensure a constitutional plan was set forth in our decision in *Butcher*. In that matter, our Court, after concluding a constitutionally infirm redistricting of both houses of the General Assembly resulted in an impairment of our citizens' right to vote, found it prudent to allow the legislature an additional opportunity to enact a legal remedial plan. *Butcher*, 216 A.2d at 457-58. Yet, we also made clear that a failure to act by the General Assembly by a date certain would result in judicial action "to ensure that the individual voters of this Commonwealth are afforded their constitutional right to cast an equally weighted vote." *Id*. at 458-59. After the deadline passed without enactment of the required statute, we fashioned affirmative relief, after the submission of proposals by the parties. *Id*. at 459. Our Order in this matter, cited above, is entirely consistent with our remedy in *Butcher*. *See also Mellow v. Mitchell*, 607 A.2d 204, 205-06 (Pa. 1992) (designating master in wake of legislative failure to

remedy redistricting of seats for the Pennsylvania House of Representatives which was held to be unconstitutional).

Our approach is also buttressed by, and entirely consistent with, the United States Supreme Court's landmark ruling in *Baker v. Carr*, 369 U.S. 186 (1962), and more recent decisions from the United States Supreme Court which make concrete the state judiciary's ability to formulate a redistricting plan, when necessary. *See, e.g., Growe*; *Scott v. Germano*, 381 U.S. 407 (1965) (*per curiam*). As described by the high Court in *Wise*, "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation,' *Conner v. Finch*, [431 U.S. 407, 415 (1977)], of the federal court to devise and impose a reapportionment plan pending later legislative action." *Wise,* 437 U.S. at 540. The same authority to act is inherent in the state judiciary.

Specifically, in *Growe*, the United States Supreme Court was faced with the issue of concurrent jurisdiction between a federal district court and the Minnesota judiciary regarding Minnesota's state legislative and federal congressional districts. The high Court, in a unanimous decision authored by Justice Scalia, specifically recognized the role of the state judiciary in crafting relief: "In the reapportionment context, the Court has required federal judges to defer [to] consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33 (emphasis original). As an even more pointed endorsement of the state judiciary's ability to craft appropriate relief – indeed, encouraging action by the state judiciary – the *Growe* Court quoted its prior decision in *Scott*:

> The power of the judiciary of a State to require valid reapportionment *or to formulate a valid redistricting plan* has not only been recognized by this Court but appropriate

> action by the States in such cases has been specifically encouraged.

Id. at 33 (quoting *Scott*, 381 U.S. at 409) (emphasis added).

Thus, the *Growe* Court made clear the important role of the state judiciary in ensuring valid reapportionment schemes, not only through an assessment of constitutionality, but also through the enactment of valid legislative redistricting plans. Pursuant to *Growe,* therefore, although the legislature has initial responsibility to act in redistricting matters, that responsibility can shift to the state judiciary if a state legislature is unable or unwilling to act, and then to the federal judiciary *only* once the state legislature or state judiciary have not undertaken to remedy a constitutionally infirm plan.

Finally, virtually every other state that has considered the issue looked, when necessary, to the state judiciary to exercise its power to craft an affirmative remedy and formulate a valid reapportionment plan. *See, e.g., People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1229 (Colo. 2003) (offering, in addressing the issue of how frequently the legislature can draw congressional districts, that United States Supreme Court is clear that states have the primary responsibility in congressional redistricting, and that federal courts must defer to the states, including state courts, especially in matters turning on state constitution); *Hippert v. Richie*, 813 N.W.2d 374, 378 (Minn. 2012) (explaining that, as legislature and Governor failed to enact a legislative redistricting plan by deadline, it was up to the state judiciary to prepare a valid legislative plan and order its adoption, citing *Growe* as "precisely the sort of state judicial supervision of redistricting" that the United States Supreme Court has encouraged); *Brown v. Butterworth*, 831 So.2d 683, 688-89 (D.C. App. Fla 2002) (emphasizing constitutional power of state judiciary to require valid reapportionment); *Stephenson v. Bartlett*, 562 S.E.2d 377, 384 (N.C. 2002) (noting that it is only the Supreme Court of North Carolina that can answer state

constitutional questions with finality, and that, "within the context of state redistricting and reapportionment disputes, it is well within the 'power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan'" (quoting *Germano*, 381 U.S. at 409)); *Wilson v. Fallin*, 262 P.3d 741, 745 (Okla. 2013) (holding that three decades after *Baker v. Carr*, the United States Supreme Court in *Growe* was clear that state courts may exercise jurisdiction over legislative redistricting and that federal courts should defer to state action over questions of state redistricting by state legislatures and state courts); *Alexander v. Taylor*, 51 P.3d 1204, 1208 (Okla. 2002) ("It is clear to us that [*Baker* and *Growe*], . . . stand for the proposition that Art. 1, § 4 does not prevent either federal or state courts from resolving redistricting disputes in a proper case."); *Boneshirt v. Hazeltine*, 700 N.W.2d 746, 755 (S.D. 2005) (Konenkamp, J., concurring) (opining that the Supreme Court recognized that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged" and that both "[r]eason and experience argue that courts empowered to invalidate an apportionment statute which transgresses constitutional mandates cannot be left without the means to order appropriate relief."); *Jensen v. Wisconsin Board of Elections*, 639 N.W.2d 537, 542 (Wis. 2002) (*per curiam*) (noting deference of federal courts regarding "consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself" and that "any redistricting plan judicially 'enacted' by a state court (just like one enacted by a state legislature) would be entitled to presumptive full-faith-and-credit legal effect in federal court."); *but see Maudlin v. Branch*, 866 So.2d 429 (Miss. 2003) (finding, under Mississippi statute, no Mississippi court had jurisdiction to draw plans for congressional districting).

Thus, it is beyond peradventure that it is the legislature, in the first instance, that is primarily charged with the task of reapportionment. However, the Pennsylvania Constitution, statutory law, our Court's decisions, federal precedent, and case law from our sister states, all serve as a bedrock foundation on which stands the authority of the state judiciary to formulate a valid redistricting plan when necessary. Our prior Order, and this Opinion, are entirely consistent with such authority.[79]

VII. Conclusion

For all of these reasons, the Court entered its Order of January 22, 2018, striking as unconstitutional the Congressional Redistricting Act of 2011, and setting forth a process assuring that a remedial redistricting plan would be in place in time for the 2018 Primary Elections.

Justices Donohue, Dougherty and Wecht join the opinion.

Justice Baer files a concurring and dissenting opinion.

Chief Justice Saylor files a dissenting opinion in which Justice Mundy joins.

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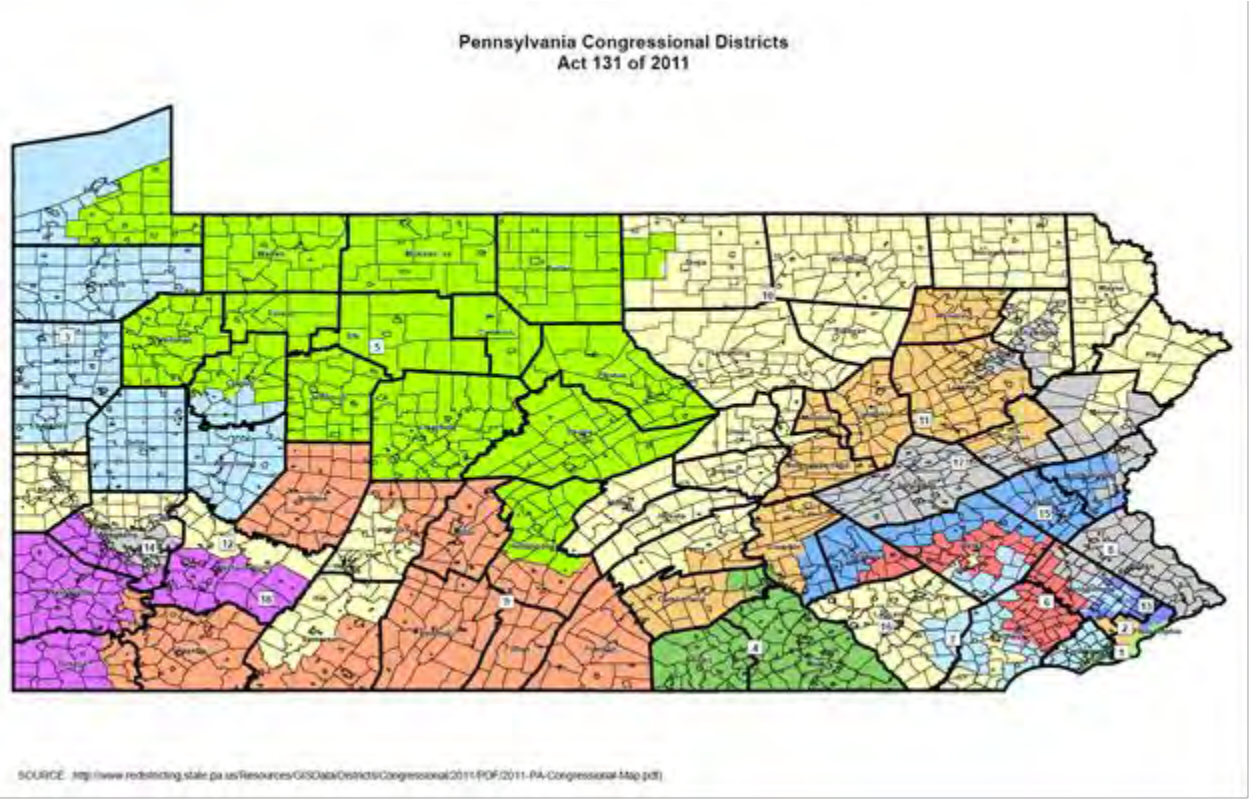
[79] Justice Mundy, in her dissent, seemingly reads the federal Elections Clause in a vacuum, and, to the extent that she suggests an inability, or severely circumscribed ability, of state courts generally, or of our Court *sub judice*, to act, this approach has not been embraced or suggested by the United States Supreme Court or the Pennsylvania Supreme Court for over a half century. Indeed, to read the federal Constitution in a way that limits our Court in its power to remedy violations of our Commonwealth's Constitution is misguided and directly contrary to bedrock notions of federalism embraced in our federal Constitution, and evinces a lack of respect for state rights. In sum, and as fully set forth above, in light of interpretations of the Elections Clause like that found in *Growe* – which encourage federal courts to defer to state redistricting efforts, including congressional redistricting, and expressly permit the judicial creation of redistricting maps when a legislature fails to act – as well as essential jurisprudential concepts of comity and federalism, it is beyond peradventure that state courts possess the authority to grant equitable remedies for constitutional violations, including the drawing of congressional maps (of course, subject to federal safeguards and, principally, the Voting Rights Act).

Justice Mundy files a dissenting opinion.

Appendix A


Pennsylvania Congressional Districts
Act 131 of 2011
SOURCE: http://www.redistricting.state.pa.us/Resources/GISData/Districts/Congressional/2011/PDF/2011-PA-Congressional-Map.pdf)

218 A.3d 1214
Supreme Court of Pennsylvania.

Christopher G. YANAKOS, Susan Kay Yanakos and William Ronald Yanakos, Her Husband, Appellants
v.
UPMC, University of Pittsburgh Physicians, Amadeo Marcos, M.D. and Thomas Shaw-Stiffel, M.D., Appellees

No. 10 WAP 2018
|
Argued: October 24, 2018
|
Decided: October 31, 2019

Synopsis

Background: Twelve years after transplant surgery, patient, a live donor recipient, brought action against hospital and physicians, raising claims that included medical malpractice. The Court of Common Pleas, Allegheny County, Civil Division, No. GD–15–022333, Michael A. Della Vechhia, J., granted defendants' motion for judgment on the pleadings. Patient appealed. The Superior Court, No. 1331 WDA 2016, Ransom, J., 2017 WL 3168991, affirmed. Patient filed petition for allowance of appeal.

[Holding:] The Supreme Court, No. 10 WAP 2018, Mundy, J., held that statute of repose contained in Medical Care Availability and Reduction of Error (MCARE) Act was unconstitutional.

Reversed and remanded.

Donohue, J., concurred in part, dissented in part, and filed opinion.

Wecht, J., filed a dissenting opinion.

Procedural Posture(s): Petition for Discretionary Review; On Appeal; Motion for Judgment on the Pleadings.

West Headnotes (7)

[1] **Appeal and Error** Judgment on the pleadings

Supreme Court's standard of review of a trial court's order sustaining judgment on the pleadings requires the court to determine whether, based on the facts the plaintiff pled, the law makes recovery impossible.

1 Cases that cite this headnote

[2] **Appeal and Error** Statutory or legislative law

Challenge to the constitutionality of a statute is a question of law, over which Supreme Court's standard of review is de novo, and its scope of review is plenary.

[3] **Constitutional Law** Strict or heightened scrutiny; compelling interest

Statutes which infringe on the right to a remedy —and other important rights—are subject to a heightened level of scrutiny.

[4] **Constitutional Law** Intermediate scrutiny

Intermediate standard for reviewing constitutionality of a statute requires that the government interest be an important one, that the classification be drawn so as to be closely related to the objectives of the legislation, and that the person excluded from an important right or benefit be permitted to challenge his exclusion on the grounds that in his particular case, denial of the right or benefit would not promote the purpose of the classification.

[5] **Constitutional Law** Intermediate scrutiny

Unlike the rational basis test, intermediate scrutiny does not evaluate the reasonableness or arbitrariness of legislation.

[6] **Constitutional Law** Time for proceedings

Limitation of Actions Constitutionality of statute

Seven-year statute of repose contained in the Medical Care Availability and Reduction of Error (MCARE) Act, which operated to deprive medical malpractice plaintiffs who did not discover their injuries within seven years of their constitutional right to a remedy, except for plaintiffs with injuries caused by foreign objects or injuries to minors, was not substantially related to legislatively identified governmental interest in controlling cost of malpractice insurance rates by providing actuarial predictability to insurers, and thus, was unconstitutional, where there was no evidence indicating how that time period, as opposed to a longer or shorter period, would have any effect on malpractice insurance costs. (Per Mundy, J., with two Justices concurring and one Justice concurring in result.) Pa. Const. art. 1, § 11; 40 Pa. Stat. Ann. § 1303.513.

1 Cases that cite this headnote

[7] **Constitutional Law** Intermediate scrutiny

Under intermediate scrutiny, the party defending the statute's constitutionality has the burden to demonstrate the legislation is substantially related to its purpose; to meet this burden, the statute's proponent can rely on a wide range of sources, including legislative history, empirical evidence, case law, and even common sense, but it may not rely upon mere anecdote and supposition. (Per Mundy, J., with two Justices concurring and one Justice concurring in result.)

1 Cases that cite this headnote

West Codenotes

Held Unconstitutional

40 Pa. Stat. Ann. § 1303.513

***1215** Appeal from the Order of the Superior Court entered July 26, 2017 at No. 1331 WDA 2016, affirming the Order of the Court of Common Pleas of Allegheny County entered August 29, 2016 at No. GD-15-022333. Michael A. Della Vecchia, Judge.

Attorneys and Law Firms

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SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE MUNDY

***1216** *Justice Mundy files the Opinion of the Court with respect to Part I and Part III to the extent supported by Justice Donohue as indicated in her concurring and dissenting opinion. Justice Mundy also files an opinion with respect to Part II, joined by Justices Todd and Dougherty, and announces the Judgment of the Court.*

In this appeal by allowance, we consider whether the seven-year statute of repose in Section 1303.513(a) of the Medical Care Availability and Reduction of Error Act (MCARE Act) [1] comports with Article I, Section 11 of the Pennsylvania Constitution, which guarantees "[a]ll **courts** **shall** be **open**; and every man for an injury done him in his lands, goods, person or reputation **shall** have remedy by due course of law[.]" PA. CONST. art. I, § 11. Because we conclude the seven-year statute of repose is not substantially related to an important government interest, we reverse the Superior Court's order affirming the trial court's grant of judgment on the pleadings and remand for further proceedings.

I.

Susan Yanakos suffers from a genetic condition called Alpha-1 Antitrypsin Deficiency (AATD). Patients with AATD do not produce enough Alpha-1 Antitrypsin, a protein

synthesized in the liver that plays an important role in protecting the lungs from damage. R.R. at 4a-5a. In the summer of 2003, one of Susan's physicians, Dr. Amadeo Marcos, advised her that she needed a liver transplant due to the progression of her AATD. Because Susan was not a candidate for a cadaver liver, her son Christopher volunteered to donate a lobe of his liver to his mother.

Christopher underwent an extensive medical evaluation to determine whether he was a suitable liver donor. As part of that process, and at Dr. Marcos's request, Dr. Thomas Shaw-Stiffel evaluated Christopher. Christopher advised Dr. Shaw-Stiffel that several of his family members suffered from AATD, but that he was unsure whether he did as well. Dr. Shaw-Stiffel ordered additional laboratory tests for Christopher, but never informed him of the results, which allegedly showed that Christopher had AATD and was not a candidate for liver donation.[2] One month after Christopher's consultation with Dr. Shaw-Stiffel, in September 2003, Dr. Marcos went forward with the operation, removing a portion of Christopher's liver and transplanting it into Susan.

More than twelve years later, in December 2015, Christopher, Susan, and Susan's husband, William Yanakos (collectively "the Yanakoses") sued UPMC, University of Pittsburgh Physicians, Dr. Marcos, and Dr. Shaw-Stiffel (collectively "Appellees"). In their complaint, the Yanakoses raised claims for battery/lack of informed consent, medical malpractice, and loss of consortium. The Yanakoses alleged that they did not discover Appellees' negligence until eleven years after the transplant surgery, when additional testing revealed that Susan ***1217** still had AATD, which the transplant should have eliminated.

In their answer to the Yanakoses' complaint, Appellees raised the affirmative defense that the seven-year statute of repose[3] in the MCARE Act barred the Yanakoses' claims. *See* 40 P.S. § 1303.513(a) (providing that "no cause of action asserting a medical professional liability claim may be commenced after seven years from the date of the alleged tort or breach of contract"). Appellees also filed a motion for judgment on the pleadings based on the MCARE Act's repose period.

The trial court concluded that it was bound by the plain language of the MCARE Act's seven-year statute of repose. The court explained that, while the MCARE Act contains two exceptions to the seven-year repose period, the Yanakoses' claims did not fall within either of those exceptions. Trial Ct. Op. at 5-6; *see* 40 P.S. § 1303.513(b) (exception for injuries caused by foreign objects left in a patient's body); 40 P.S. § 1303.513(c) (exception for malpractice claims commenced by or on behalf of a minor). Accordingly, the trial court granted Appellees' motion for judgment on the pleadings.

The Yanakoses appealed to the Superior Court, raising several constitutional challenges to the MCARE Act's seven-year statute of repose. Relevant to this appeal, the Yanakoses argued that the MCARE Act's repose period violates Article I, Section 11 of the Pennsylvania Constitution, which provides in pertinent part that "[a]ll **courts** **shall** be **open**; and every man for an injury done him in his lands, goods, person or reputation **shall** have a remedy by due course of law, and right and justice administered without sale, denial or delay." PA. CONST. art. I, § 11. Citing appellate court decisions from states with Open Courts provisions much like our own, the Yanakoses urged the Superior Court to hold that the MCARE Act's statute of repose interfered with the Article I, Section 11 right of access to the courts because its exception for foreign object plaintiffs was "arbitrary and capricious." *See* Yanakoses' Super. Ct. Brief at 43-45 (relying on *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985)).

The Superior Court rejected the Yanakoses' argument. The panel explained that this Court, in *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715 (1978), held that a twelve-year statute of repose on claims against architects and builders did not violate the Open Courts provision of the Pennsylvania Constitution.[4] *Yanakos v. UPMC*, 2017 WL 3168991, at * 7 (Pa. Super. 2017) (unpublished memorandum). The appellant in *Freezer Storage* argued only that the Open Courts provision precluded the legislature from abolishing a cause of action without ***1218** implementing another remedy. *Freezer Storage*, 382 A.2d at 720. Although *Freezer Storage* rejected as nonbinding *dicta* language in earlier cases that had suggested the General Assembly might need to create an adequate substitute remedy in order to eliminate a common law cause of action,[5] the decision in *Freezer Storage* was narrow. We did not hold that the legislature possesses an unlimited authority to modify the common law, nor did we articulate a concrete test for measuring the lawfulness of statutes that

abolish or modify common law remedies. *See* *id.* at 721 ("To the extent that the *dictum* [in *Dolan v. Linton's Lunch*] suggests that the Legislature may never abolish a judicially recognized cause of action, we decline to follow it."). Nevertheless, the Superior Court's conclusion that the MCARE Act's statute of repose did not violate Article I, Section 11 was based entirely upon the precept—announced in *Freezer Storage*—that the Constitution "does not prohibit the Legislature from abolishing a common law right of action without enacting a substitute means of redress." *Yanakos*, 2017 WL 3168991, at *7 (citing *Freezer Storage*, 382 A.2d at 720).

[1] **[2]** The Yanakoses filed a petition for allowance of appeal, arguing that the Superior Court misapplied *Freezer Storage*, and, in doing so, implicitly nullified the constitutional right to a remedy. We granted the Yanakoses' petition to consider whether the MCARE Act's seven-year statute of repose violates Article I, Section 11 of the Pennsylvania Constitution.[6] *Yanakos v. UPMC*, 646 Pa. 14, 183 A.3d 346 (Pa. 2018) (per curiam).

Before this Court, the Yanakoses argue that legislation which deprives medical malpractice victims of their right to file a civil action "must be subjected to exacting constitutional scrutiny." Yanakoses' Brief at 12. This is so, according to the Yanakoses, because the right to a remedy for every wrong is deeply rooted in the Anglo-American legal tradition and explicitly enshrined in the Pennsylvania Constitution. *Id.* at 14. The Yanakoses concede that the right to seek a remedy in the courts is not unfettered, and they acknowledge that the General Assembly may impose some limits on traditional common law theories of recovery. Even so, they argue that any such statutory restrictions or limits must be subject to intermediate scrutiny. *Id.* at 18-19 (recognizing this Court applied intermediate scrutiny to an Article I, Section 11 constitutional challenge in *James v. Southeastern Pennsylvania Transportation Authority*, 505 Pa. 137, 477 A.2d 1302, 1306 (1984)).[7]

***1219** According to the Yanakoses, the MCARE Act's statute of repose cannot withstand intermediate scrutiny because the General Assembly clearly recognized the harshness of the statute of repose when it preserved access to courts for foreign object malpractice victims. *Id.* at 12; *see also* 40 P.S. § 1303.512(b) (providing that the statute of repose shall not apply "[i]f the injury is or was caused by a foreign object unintentionally left in the individual's body"). The Yanakoses contend that this distinction between foreign object malpractice claims and non-foreign object malpractice claims is not "substantially related to the government's important objective of reducing medical costs." Yanakoses' Brief at 35. In other words, the Yanakoses believe that the MCARE Act's statute of repose fails to withstand intermediate scrutiny "because, as applied, it bars the cause of action of some injured patients, while allowing others who were similarly injured to proceed." *Id.* at 20 (emphasis omitted). Along these lines, the Yanakoses assert that the law "goes beyond the government's legitimate purpose by unduly eliminating the important right of certain victims of medical malpractice from seeking any remedy through no fault of their own." *Id.*

Appellees, on the other hand, argue that "[t]he Open Courts provision only applies when a statute extinguishes a right (such as a cause of action or defense) after that right has already accrued/vested." UPMC's Brief at 10; *see* *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 842 A.2d 919, 930 (2004) (explaining that Article 1, Section 11 prevents the General Assembly from extinguishing an already-accrued cause of action).[8] Appellees emphasize that this is not the case here because the MCARE Act went into effect in 2002--about a year before Appellees' allegedly negligent conduct. Although Appellees concede that Article I, Section 11 prevents the General Assembly from extinguishing already vested legal claims, they argue it does not prevent the legislature from abolishing a recognized cause of action altogether. *Id.* at 11. When the General Assembly does abolish a cause of action (or, as is the case here, effectively abolishes it for some class of would-be plaintiffs), Appellees argue reviewing courts should apply the rational basis test and uphold the law as long as it is rationally related to a legitimate government interest. *Id.* at 20; Physicians' Brief at 17.

Alternatively, Appellees maintain that, even if we apply some form of heightened scrutiny, the MCARE Act's seven-year statute of repose nevertheless should be upheld. UPMC's Brief at 36. In this regard, Appellees contend that the statute of repose is justified given the Commonwealth's important interest in controlling the cost of professional liability insurance and in "curtailing litigation difficulties associated with stale claims." *Id.* at 37. Appellees posit that one way to reduce malpractice insurance premiums is to reduce the number of professional liability claims that insurers must pay and defend against. One method to accomplish that is by enacting a statute of repose, which removes the temporally

unlimited exposure that would otherwise exist because of the discovery rule to the statute of limitations. [9]

***1220** II.

A.

The Pennsylvania Constitution provides our citizens with a right to a remedy in Article I, Section 11, which states:

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

PA. CONST. art. I, § 11. In the past, this Court has recognized that Article 1, Section 11 "provided that where a legal injury is sustained, there shall and will always be access to the courts of this Commonwealth." *Masloff v. Port Auth. of Allegheny County*, 531 Pa. 416, 613 A.2d 1186, 1190 (1992). Although the Federal constitution does not contain an analogous protection, the majority of state constitutions include a similar provision. *See* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 (1992) (noting "the citizens of thirty-nine states can claim a constitutional 'right to a remedy.' ").

Historically, this Court and other state courts have traced the foundation of the "right to a remedy" to the Magna Carta. [10] *Ieropoli*, 842 A.2d at 925 (Pa. 2004) ("This provision, commonly referred to as the 'open courts' or 'remedies' clause, is derived from Magna Carta and Sir Edward Coke's Seventeenth Century commentary on the Great Charter, which was relied upon by the drafters of early American state constitutions."); Schuman, *supra*, at 1199 (explaining modern remedies clauses are derived from Lord Coke's commentary on Magna Carta); *see also* *Menges v. Dentler*, 33 Pa. 495, 498 (Pa. 1859) ("Parliament may disregard Magna [Carta], but our legislature must obey the constitution."). The Remedies Clause was added to the Pennsylvania Constitution in 1790. As an overview, the 1789-1790 constitutional convention:

> repealed Pennsylvania's frame of government enacted in the early months of the Revolution, replacing it with the 1790 Constitution, a document that embodied the republican principles of 1776: a Bill of Rights, an independent judiciary, and an elected legislature and executive. The new frame of government, however, significantly altered the relationship between the branches of government. Gone were the weak plural executive and the all-powerful unicameral Assembly; in their place the delegates provided for a governor equipped with veto power and a bicameral legislature. Furthermore, the convention established the direct popular election of the governor and the members of the Senate and House of Representative and provided for legislative districts based on equitable divisions of population.

Joseph S. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789-1790*, 59 PA. HIST.: J. MID-ATLANTIC STUD. 122, 123 (1992).

Focusing on the Remedies Clause, the minutes of the constitutional convention reveal that the Remedies Clause was originally proposed without the second sentence limiting suits against the Commonwealth. ***1221** [11] MINUTES OF THE CONVENTION OF 1789-90, at 162 (memorializing committee report of Dec. 23, 1789), *available at* https://www.paconstitution.org/wp-content/uploads/2017/11/proceedings1776-1790-1.pdf. The drafters later added a second sentence providing "[s]uits may be brought against the [C]ommonwealth as well as against other bodies corporate and individuals" without the limitation that the legislature could limit suits against the Commonwealth. *Id.* at 282 (Aug. 27, 1790 convention amendment). Subsequently, the drafters struck the phrase "as

well as against other bodies corporate and individuals" and substituted "in such manner, in such courts and in such cases as the legislature shall, by law, direct." *Id.* at 291-92 (Aug. 31, 1790 convention amendment). Apart from showing how the drafters limited the right to a remedy in suits against the Commonwealth, the minutes of the convention do not contain any meaningful discussion of the Remedies Clause.

In recognizing that Article I, Section 11 protects a citizen's right to a remedy, this Court has interpreted it as an "imperative limitation[ ] on legislative authority, and imperative imposition[ ] of judicial duty." *Menges*, 33 Pa. at 498. Notwithstanding this interpretation, however, in more recent opinions, we have recognized the inherent legislative prerogative of guiding the formation of the law. *Freezer Storage*, 382 A.2d at 721. Indeed, in upholding a statute of repose that limited the liability of individuals performing building repairs, we noted the balance between the legislature guiding the law and the courts in interpreting it:

> This Court would encroach upon the Legislature's ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts. To do so would be to place certain rules of the "common law" and certain non-constitutional decisions of courts above all change except by constitutional amendment. Such a result would offend our notion of the checks and balances between the various branches of government, and of the flexibility required for the healthy growth of the law.

Id. In crafting the jurisprudence surrounding the remedies clause in this way, we diverged from a quid pro quo analysis of the remedies clause, where "we originally required the legislature to provide a substitute remedy anytime it eliminated a remedy." *Konidaris v. Portnoff Law Assocs.*, 598 Pa. 55, 953 A.2d 1231, 1240 (2008). [12] This line of cases represented a shift away from treating the constitutional protections inherent in the remedies clause as a fundamental right. *Compare id.*, *and* *Freezer Storage*, 382 A.2d at 721, *with* ***1222** *Kelly v. Brenner*, 317 Pa. 55, 175 A. 845, 847 (1934) (describing the right to a remedy and open courts as a "fundamental right[ ] which should not be infringed upon, unless no other course is reasonably possible").

Because this Court has "curtailed the reach of the remedies clause" in the past, it follows that the right to a remedy is not a fundamental right. *Konidaris*, 953 A.2d at 1241. Nonetheless, based on the right's explicit inclusion in our constitution, coupled with its historical significance, the right to a remedy is an important right. *See* PA. CONST. art. I, § 11; *see also* *Smith v. City of Phila.*, 512 Pa. 129, 516 A.2d 306, 311 (1986) (plurality opinion) (explaining "[b]ecause the right implicated ... —access to the courts—is specifically limited by Art. I, § 11 of the Pennsylvania Constitution, we concluded that it is not a fundamental right").

B.

[3] Because the MCARE Act curtails the important constitutional right to a remedy, we must apply intermediate scrutiny to determine whether the MCARE statute of repose is substantially related to achieving an important government interest. *See* *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Statutes which infringe on the right to a remedy—and other important rights—are subject to a heightened level of scrutiny. *See James*, 477 A.2d at 1306 (applying a heightened standard of review when analyzing a law which restricted the plaintiff's "important interest in access to the courts"); *see also Smith*, 516 A.2d at 311 (Noting that the "important interest in access to the courts ... should be examined pursuant to an intermediate standard of review."). [13]

[4] **[5]** More colloquially deemed intermediate scrutiny,

> [t]his standard of review requires that the government interest be an 'important' one; that the classification be drawn so as to be closely related to the objectives of the legislation; and that the person excluded from an important right or benefit be

> permitted to challenge his exclusion on the grounds that in his particular case, denial of the right or benefit would not promote the purpose of the classification.

Smith, 516 A.2d at 311. [14] Under intermediate scrutiny, the proponent of the statute ***1223** "bears the burden of proof on the appropriateness of the means it employs to further its interest." *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 353 (3d Cir. 2016) (citing *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)).

That this Court in *James* has identified the Article I, Section 11 right as important and applied intermediate scrutiny in evaluating challenges implicating that right belies the dissenting opinion's position that intermediate scrutiny is "manifestly incompatible with our existing Remedies Clause jurisprudence[.]" Dissenting Op. (Wecht, J.) at 1243. [15] Further, the dissent's recognition that the 1790 Constitution was a response to unchecked legislative power is in tension with its adoption of a "heightened scrutiny" test that is deferential to legislative enactments. *Compare id.* at 1240 *with id.* at 1242–43. The dissent's "heightened scrutiny" is a hybrid test that subjects the legislature's goal to higher scrutiny ("response to a clear social or economic need") but does not similarly subject the legislature's means to any additional scrutiny ("a rational and non-arbitrary connection to that need"). *Id.* at 1242; *see also* *Kramer v. Workers' Comp. Appeal Bd. (Rite Aid Corp.)*, 584 Pa. 309, 883 A.2d 518, 534 (2005) (noting rational basis test is deferential to legislative enactments). Under this "heightened scrutiny," as long as the legislature seeks to ameliorate a clear social or economic need, the means it selects, i.e. the legislation, are reviewed under a rational basis standard to determine if they are rational and non-arbitrary. Pennsylvania courts have never utilized such a test in connection with the Remedies Clause or otherwise. Further, we reject this test because it does not adequately safeguard the important right to a remedy.

III.

[6] Applying intermediate scrutiny, we conclude the governmental interest in controlling the rising costs of medical malpractice insurance premiums and of medical care is important. However, the MCARE Act's statute of repose as enacted is not substantially related to achieving those goals. Generally, statutes of repose are intended to provide actuarial certainty to insurers in calculating insurance premium rates:

> Perhaps the most noted justification for statutes of repose is the desire to alleviate the insurance problem facing manufacturers, the medical profession, and the construction industry. Responsibility for older products, latent medical problems, and 'permanent' or durable improvements expose these groups to abnormally long periods of potential liability and unusually large numbers of potential plaintiffs. Proponents contend that this 'long-tail' problem is the principal culprit in the alleged 'insurance crisis.' Theoretically, by cutting off a defendant's liability after a given number of years, statutes of repose lead to more certain liability and thus provide greater actuarial precision in setting insurance rates. More certain liability and stabilized insurance rates in turn facilitate efficient business planning and ultimately benefit businessmen, professionals, consumers, and the economy.

Josephine Herring Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 632-33 (1985) (footnotes omitted).

***1224** Indeed, a review of the legislative history of the MCARE Act indicates this was the purpose of including a statute of repose. Representative Curtis Schroder, who sponsored the amendment introducing a statute of repose, stated:

> Well, right now, of course, there is a 2-year statute of limitations with a discovery rule, and the problem with that is, it is very difficult

> for any malpractice insurer to come up with accurate rates based upon any predictability, any stability or certainty, and part of our whole effort here is to provide the stability and predictability that malpractice carriers will need and have told us that they will need to come back into the State of Pennsylvania and to help reduce this crisis.

H.B. 1802, House Journal, Jan. 29, 2002, at 116.

At the time of Representative Schroder's remarks, the proposed bill contained a four-year statute of repose. H.B. 1802, 186th Leg., Printer's No. 3202, at 99 (Pa. Jan. 29, 2002). It did not include a time-limit for foreign objects cases. *Id.* Further, minors whose claim accrued when they were younger than 14 had to commence an action no later than four years from when their parent or guardian knew or should have known of the cause of action, or four years from their fourteenth birthday, whichever was earlier. [16] *Id.* Addressing a question about the limitation on minors' causes of action, Representative Schroder responded:

> [T]he rationale was to try to establish a reasonable number that will, you know, provide predictability and stability in predicting these claims so the proper underwriting can occur and that the current system has really no way of predicting, you know, when or if or how long into the future a lot of these cases will be brought about with regards to minors. So it was an area that we felt we needed to provide some stability and predictability in, and 4 years, I am not saying there is a magic number to it, but it seemed like a reasonable resolution to that issue.

H.B. 1802, House Journal, Jan. 29, 2002, at 116.

Through the legislative process, the Senate removed the four-year statute of repose and instead provided that all causes of action must be "commenced within the existing applicable statute of limitations." H.B. 1802, 186th Leg., Printer's No. 3320, at 102 (Pa. Feb. 12, 2002). Thereafter, the Senate Committee on Rules and Executive Nominations reinserted a seven-year statute of repose, which the General Assembly enacted. H.B. 1802, 186th Leg., Printer's No. 3402, at 39-40 (Pa. Mar. 13, 2002). It provides:

> **§ 1303.513. Statute of repose**
>
> **(a) General rule.--**Except as provided in subsection (b) or (c), no cause of ***1225** action asserting a medical professional liability claim may be commenced after seven years from the date of the alleged tort or breach of contract.
>
> **(b) Injuries caused by foreign object.--**If the injury is or was caused by a foreign object unintentionally left in the individual's body, the limitation in subsection (a) shall not apply.
>
> **(c) Injuries of minors.--**No cause of action asserting a medical professional liability claim may be commenced by or on behalf of a minor after seven years from the date of the alleged tort or breach of contract or after the minor attains the age of 20 years, whichever is later.
>
> **(d) Death or survival actions.--**If the claim is brought under 42 Pa.C.S. § 8301 (relating to death action) or 8302 (relating to survival action), the action must be commenced within two years after the death in the absence of affirmative misrepresentation or fraudulent concealment of the cause of death.
>
> ...
>
> **(f) Definition.--**For purposes of this section, a "minor" is an individual who has not yet attained the age of 18 years.

40 P.S. § 1303.513.

The effect of the seven-year repose period for most medical malpractice actions is to limit the "discovery rule" to seven years. [17] In most cases, if a malpractice victim discovers the injury and its cause within seven years, the victim may bring a timely lawsuit; however, after seven years, the statute of repose bars the victim's action. Additionally, foreign objects cases are exempt from the statute of repose, and minors can file a lawsuit either seven years from the date of injury or until their twentieth birthday, whichever is later. [18] Thus, the statute of repose prevents most medical malpractice victims,

except foreign objects plaintiffs and certain minors, from exercising the constitutional right to a remedy after seven years.

[7] In order for this statutory scheme infringing on the Article I, Section 11 right to a remedy to pass intermediate scrutiny, it must be substantially or closely related to an important government interest. As noted, the goal of the statute of repose was to control medical malpractice premium rates by providing actuarial certainty. Accordingly, the question is whether the seven-year statute of repose is substantially related to controlling the cost of medical malpractice premium rates. Under intermediate scrutiny, the party defending the statute's constitutionality has the burden to demonstrate the legislation is substantially related to its purpose. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982); *see also* *Binderup*, 836 F.3d at 353. To meet this burden, the statute's proponent "can rely on a wide range of sources, including legislative history, empirical evidence, case law, and even common sense, but it may not 'rely upon mere anecdote ***1226** and supposition.' " *Tyler v. Hillsdale County Sheriff's Dep't*, 837 F.3d 678, 694 (6th Cir. 2016) (quoting *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012)).

In this case, there was no evidence to show the initially proposed four-year statute of repose would provide actuarial certainty, except that it "seemed like a reasonable resolution" to "provide some stability and predictability" to insurers. H.B. 1802, House Journal, Jan. 29, 2002, at 116. Moreover, there is no evidence in the legislative history as to how the General Assembly arrived at a seven-year statute of repose with exceptions for foreign objects cases and minors. The legislature did not cite any statistics on the number of medical malpractice actions that are commenced after seven years of the occurrence giving rise to the action.[19] There is no indication that such a time period, as opposed to a longer or shorter period, will have any effect on malpractice insurance costs.

Likewise, the parties in their current briefing failed to suggest the seven-year repose period has any substantial relationship to the legislative goal of controlling malpractice insurance costs. *See* UPMC's Brief at 36-37; Physicians' Brief at 19. Appellees narrowly focus on the foreign objects exception, arguing that exception is substantially related to an important government interest. However, the proper focus is on the manner in which the statute of repose infringes on the Article I, Section 11 right to a remedy: the statute permits malpractice victims who discover their injury and its cause within seven years, foreign objects plaintiffs, and minors to exercise their constitutional right to a remedy; on the other hand, the statute deprives malpractice victims who do not discover their injury or its cause within seven years of their right to a remedy. Appellees have not demonstrated that this seven-year period is substantially related to the goal of controlling insurance premiums.[20]

Additionally, the statute of repose as enacted does not offer insurers a definite period after which there will be no liability because it exempts foreign objects cases and minors, so insurers still have to account for those unpredictable "long-tail" cases in calculating malpractice insurance premiums. Therefore, the seven-year statute of repose, with exceptions for foreign objects cases and minors, is not substantially related to controlling the cost of malpractice insurance rates by providing actuarial predictability to insurers. Accordingly, ***1227** we conclude the MCARE Act's statute of repose is unconstitutional, reverse the order of the Superior Court, and remand for further proceedings.

Justices Todd and Dougherty join the opinion.

Justice Donohue joins Part I of the opinion, as well as Part III to the extent specified in her responsive opinion, and files a concurring and dissenting opinion.

Justice Wecht files a dissenting opinion, joined by Chief Justice Saylor and Justice Baer.

JUSTICE DONOHUE, Concurring and Dissenting

I concur in the result reached by Justice Mundy in the lead Opinion. I respectfully dissent, however, from the lead Opinion's conclusion that the right to a remedy guaranteed by Article I, Section 11 of the Pennsylvania Constitution is not a fundamental right mandating the application of strict scrutiny to an infringing statute.

Article I, Section 25 of the Pennsylvania Constitution provides:

§ 25. Reservation of powers in people

> To guard against transgressions of the high powers which we have delegated, we declare that everything in **this article** is excepted out of the general powers of government and shall forever remain inviolate.

Pa. Const. art. I, § 25 (emphasis added). Our citizens' right to a remedy "for an injury done him in his lands, goods, person or reputation" is enshrined in "this article" in Section 11. Pa. Const. art. I, § 11.

I agree with the lead Opinion that the legislative branch plays a role in guiding the development of the law. However, for the reasons discussed in this opinion and contrary to the lead Opinion, I cannot agree with any effort to demote, for the first time, our inviolate Article I, section 11 rights to mere "important" status. Rather, I would begin with the basic acknowledgment that the right to a remedy in Article I, Section 11 is a fundamental right which can only be infringed when there is a showing of a compelling state interest and that the means chosen to advance it are narrowly tailored to achieve the end. Applying that test, in my view, the statute of repose in the MCARE Act violates Article I, Section 11 of the Constitution. The test the lead Opinion adopts limits the transgressions of the General Assembly to those instances where the Commonwealth cannot show that legislation is "substantially related" to achieving some important governmental interest. While I agree with the lead Opinion that the MCARE Act's statute of repose does not even meet this low threshold, in the larger picture I fear that the undemanding test the lead Opinion adopts today places an illusory limit on the General Assembly's prerogative to infringe on the right to a remedy enshrined in Article I and instead ties this Court's hands in fulfilling our obligation to scrupulously protect the right to a remedy afforded in Article I, Section 11.

The touchstone of interpretation of our state constitution is the "actual language of the Constitution itself," *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 802 (2018) (quoting *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 842 A.2d 919, 925 (2004)), and the constitutional language "must be interpreted in its popular sense, as understood by the people when they voted on its adoption. *Id.* (quoting *Jubelirer v. Rendell*, 598 Pa. 16, 953 A.2d 514, 528 (2008)). Article I, Section 11 of the Pennsylvania Constitution provides as follows:

> § 11. Courts to be open; suits against the Commonwealth
>
> ***1228** All **courts** **shall** be **open**; and every man for an injury done him in his lands, goods, person or reputation **shall** have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Pa. Const. art. I, § 11. A natural reading of this language does not require resort to any rules of interpretation, as it plainly and unambiguously provides that our courts are open to provide every person with a remedy, by due course of law, [1] for any injury done to him in his lands, goods, person or reputation. It gives every citizen of this Commonwealth an independent constitutional guarantee of legal remedies for private wrongs through our court system. *Craig v. Kline*, 65 Pa. 399, 413 (1870) ("This provision and those as to the administration of justice in the bill of rights, require that all claims for justice between man and man, shall be tried, decided and enforced by the judicial authority of the state and by due course of law."). This foundational entitlement of a right to a remedy in a Pennsylvania court has been included in every iteration of our Constitution for well over 200 years, dating back to our Constitution of 1790.

Appellants Christopher G. Yanakos, Susan Kay Yanakos and William Ronald Yanakos (collectively, the "Yanakoses"), have alleged in a lawsuit filed in the Court of Common Pleas of Allegheny County that that they have suffered injuries as a result of medical malpractice by Appellees. Section 1303.513 of the Medical Care Availability and Reduction of Error Act ("MCARE Act"), 40 P.S. § 1303.513, however, establishes a seven-year statute of repose for medical malpractice claims. The Yanakoses argue that this statute of repose violates their right to a remedy under Article I, Section 11, as it prevents them from gaining access to our courts to obtain a remedy for injuries that were not discovered until after the seven-year period had expired. [2] Yanakoses' Brief at 14.

Here, as in the Superior Court, the Yanakoses raise constitutional challenges to the MCARE Act's statute of repose based upon their contention that the right to a remedy in Article I, Section 11 is a fundamental right and that, as such, any legislative infringement must be subject to strict scrutiny. *Id.* at 12, 21. In support of this contention that the right to a remedy in Article I, Section 11 is a fundamental right, the Yanakoses, like the lead Opinion, first recite its long and fabled history, from the Magna Carta to Sir Edward

***1229** Coke. *Id.* at 14-16. The Yanakoses then direct us to our decision in *James v. Southeastern Penn. Transp. Auth.*, 505 Pa. 137, 477 A.2d 1302 (1984), in which this Court addressed a constitutional challenge, pursuant to the equal protection provisions of the federal and Pennsylvania constitutions, to a legislatively-enacted limitation (a six-month notice requirement) on an injured individual's right to file suit against the Philadelphia transportation authority.

The Court in *James* first set forth the three levels of scrutiny at issue. Where a suspect classification has been made or a fundamental right has been burdened, the standard of review is strict scrutiny, pursuant to which a law may only be deemed constitutional if it is narrowly tailored to a compelling state interest. *Id.* at 1306; *Shoul v. Comm. Dep't of Trans., Bureau of Driver Licensing*, 643 Pa. 302, 173 A.3d 669, 676 (2017). Where "important,"[3] but not fundamental rights have been affected, or if sensitive classifications have been made, an intermediate standard of review is applied. *James*, 477 A.2d at 1306. The Court in *James* described this level of scrutiny as involving three elements: (1) the governmental interest is important, though not "compelling," (2) the governmental classification or infringement on a right must be drawn so as to be closely related to the objectives of the legislation, and (3) a person excluded from enjoyment of an important right or benefit must be permitted to challenge the denial on the grounds that his particular denial would not further the governmental purpose of the legislation. *Id.* at 1307. Finally, if the right is neither fundamental nor important, the legislation only needs to satisfy "rational basis" review, pursuant to which a law must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." *Id.* at 1306; *Shoul*, 173 A.3d at 677.

With these standards of review established, the Court in *James* directed itself to determining whether the type of right implicated was fundamental, important, or neither fundamental nor important. *James*, 477 A.2d at 1306. In this regard, we indicated that the United States Supreme Court had recently defined "fundamental rights" by stating that when determining whether the denial of a particular right is deserving of strict scrutiny, "we look to the Constitution to see if the right infringed has its source, explicitly or implicated, herein." *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)); *see also Zauflik v. Pennsbury Sch. Dist.*, 629 Pa. 1, 104 A.3d 1096, 1118 (2014) ("Fundamental rights generally are those which have their source in the Constitution."). Looking to the text of Article I, Section 11, we concluded that it contains no right to sue the Commonwealth, as its second sentence provides an express limitation on the scope of its protections, namely that "[s]uits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." Pa. Const. art. I, § 11. Accordingly, in *James* we held that "there is no 'fundamental right' to sue the Commonwealth, for such right is explicitly limited by Art. I, § 11 of the Constitution of Pennsylvania."[4] ***1230** *James*, 477 A.2d at 1306 ("Section 11 itself authorizes the Legislature to enact laws that direct the way in which a plaintiff might pursue her right to a judicial remedy against the Commonwealth."). For this reason, the Court declined to apply strict scrutiny. *Id.* Instead, because the appellant nevertheless had "an important interest in access to the courts to sue the Commonwealth in cases where the Commonwealth had consented to suit," we determined that intermediate scrutiny should be employed and applied the three-part test set forth hereinabove.

The Yanakoses contend that *James* compels the application of strict scrutiny in the present context. As the Yanakoses point out, this Court applied intermediate scrutiny in *James* because the language of Article I, section 11 carves out an exception for suits against the Commonwealth. Yanakoses' Brief at 21 (citing *James*, 477 A.2d at 1306). Article I, Section 11 contains no exceptions, however, with respect to actions between private parties, and thus by implication the opposite must also be true, namely that there **is** a fundamental right to a remedy in suits against private entities (like UPMC in the present case). *Id.*

The Yanakoses' contention that *James* must be read to establish that in actions between private parties, Article I, Section 11's right to a remedy is fundamental is amply supported. In *James* we held that no fundamental right existed **only** because the second sentence of Article I, Section 11 provides an express limitation on the scope of its protections for suits against the Commonwealth, thus strongly implying that in suits between private parties, where no such limitation applies, Article I, Section 11 confers a fundamental right.[5] We previously articulated this reasoning in *Smith v. City of Phila.*, 512 Pa. 129, 516 A.2d 306 (1986), a suit filed against the City of Philadelphia and its gas works corporation after an explosion. In explaining why we were applying intermediate scrutiny to the plaintiffs' equal protection claims rather than strict scrutiny, we made it abundantly clear that the only

reason we were doing so was because the suit was against Commonwealth entities:

> No fundamental rights are implicated because the right to a full recovery in a tort suit brought against the Commonwealth or its political subdivisions is expressly limited by our interpretation of ... Article I, Section 11 of the Pennsylvania Constitution (permitting the legislature to limit recovery against governmental units). **Strict scrutiny of the classification, therefore, is not required**.

Id. at 311 (emphasis added). The implication in *Smith* could not be more clear: ***1231** except in suits against governmental units, strict scrutiny **is** required because there is no other limitation on the right. I recognize that our decisions in *James*, *Zauflik* and *Smith* all involved equal protection and/or due process challenges rather than, as here, a direct claim for violation of Article I, section 11. There is no principled reason, however, to conclude that a right is fundamental in the context of equal protection and due process claims but is not fundamental for purposes of a direct challenge under Article I, section 11. In fact, this Court has employed this precise constitutional analysis in a direct Article I challenge to legislation. *DePaul v. Commonwealth*, 600 Pa. 573, 969 A.2d 536, 550 (2009). [6]

Moreover, critical to this Court's determination of whether the right to a remedy against private entities in Article I, Section 11 is fundamental is recognition of its placement in our Constitution. The preamble to Article I, which is entitled the "Declaration of Rights," proclaims that it contains the "general, great and essential principles of liberty and free government." Pa. Const. art. I, pmbl. Unlike the United States Constitution, which created a government of limited and enumerated powers, [7] the Pennsylvania Constitution established a government of general powers with the authority to exercise any and all powers not expressly forbidden therein. *Gondelman v. Commonwealth*, 520 Pa. 451, 554 A.2d 896, 903-04 (1989); *Commonwealth v. Wormser*, 260 Pa. 44, 103 A. 500, 501 (1918) ("The Constitution of the state permits the Legislature to enact all laws which are not forbidden by its letter or spirit."). Article I, Section 25 invokes special protections to safeguard the rights set forth in Article I.

> § 25. Reservation of powers in people
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> To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.

Pa. Const. art. I, § 25. As a result, the framers of our Constitution intended to restrain our three branches of government, including the General Assembly, from interfering with the exercise of the inviolate rights set forth in Article I. *Gondelman*, 554 A.2d at 903-04 This Court has recognized the fundamental nature of a wide variety of Article I rights, including the right to reputational security, the right to petition, the right to free expression, the right to privacy, the right to marry, the right to procreate and the right to make child-rearing decisions. *See* *Nixon v. Com.*, 576 Pa. 385, 839 A.2d 277, 287 (2003); *In re Fortieth Statewide Investigating Grand Jury*, 647 Pa. 489, 190 A.3d 560, 572–73 (2018); *Schmehl v. Wegelin*, 592 Pa. 581, 927 A.2d 183, 188 (2007); *Pap's A.M. v. City of Erie*, 571 Pa. 375, 812 A.2d 591, 604 (2002); *Spayd v. Ringing Rock Lodge,* 270 Pa. 67, 113 A. 70 (1921).

In this regard, when opining on the constitutional dimension of Article I, Section 11, this Court has always recognized that the right to a remedy set forth therein is a ***1232** **fundamental right**. In *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970), *modified on other grounds by* *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979), this Court held that a plaintiff could recover for personal injuries from a negligent defendant in the absence of actual impact. *Niederman,* 261 A.2d at 85. In so doing, we held that "[i]t is **fundamental** to our common law system that one may seek redress for every substantial wrong." *Id.* (emphasis added). In *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 486, 208 A.2d 193 (1965), this Court abolished the rule that charitable hospitals were immune from liability in tort, stating that "every member of society [is guaranteed] a remedy for a palpable wrong inflicted on him by another member of that society." *Id.* at 195 (quoting *Parker v. Griswold*, 17 Conn. 288, 303 (1844) ("An injury is a wrong; and for the redress of every wrong there is a remedy; a wrong is a violation of one's right, and for

the vindication of every right there is a remedy."). Indeed, as far back as 1847, this Court recognized that the constitutional right to a remedy is both "forever excluded from legislative invasion" and "inviolate":

> The bill of rights, which is forever excluded from legislative invasion, declares that the trial by jury **shall** remain as heretofore, and the right thereof be inviolate; that all **courts shall** be **open**, and that every man **shall** have redress by the due course of law, and that no man can be deprived of his right, except by the judgment of his peers or the law of the land.

Brown v. Hummel, 6 Pa. 86, 90 (1847). In 1859, we further emphasized that Article I, Section 11 is an express limitation on legislative authority and one that places special obligations on the judiciary:

> The bill of rights, §§ 9, 11, declares that no man **shall** be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land; and that the **courts shall** be always be **open** to every man, so as to afford remedy by due course of law for all invasions of rights, ...It seems to us ... that ... [t]hese provisions are ... imperative limitations on legislative authority, and imperative impositions of judicial duty. To the judiciary they say:—You shall administer justice to all men by due course of law, and without sale, denial, or delay; and to the legislature they say:—You shall not intermeddle with such functions.

Menges v. Dentler, 33 Pa. 495, 498 (1859). The panoply of rights in Article I, Section 11 are fundamental rights. *See, e.g.*, *Exton Drive-In, Inc. v. Home Indem. Co.*, 436 Pa. 480, 261 A.2d 319, 322 (1969) ("The right to have justice administered without delay is a fundamental right which should not be infringed unless no other course is reasonably possible."); *Kelly v. Brenner*, 317 Pa. 55, 175 A. 845 (1934) (refusing to enjoin a local ruling implementing a procedure to assure a sufficient number of jurors for jury pools, indicating that Article I, Section 11 contains "fundamental rights which should not be infringed upon, unless no other course is reasonably possible"); *see also* *Baggs's Appeal*, 43 Pa. at 516-17 ("There is nothing plainer in the bill of rights than the principle that all men stand on an equality before the judicial tribunals, and they do not stand so, if the judiciary is bound to admit an inequality created by legislative decree, by which a statute of limitations or any other element of the remedy is set aside or altered for any particular case or person.").

Regrettably, the lead Opinion finds that "the right to a remedy is not a fundamental right." Lead Op. at 1222. The lead Opinion's rationale for this conclusion is that it does not want to infringe upon the General Assembly's "prerogative of guiding ***1233** the formation of the law." *Id.* at 1221. The lead Opinion's interpretative methodology improperly uses its goal of allowing the General Assembly to meddle with a citizen's right to a remedy by due course of law in order to define the nature of the right and thus, the level of scrutiny to apply. Aside from this reverse engineering, the lead Opinion offers no support for its conclusion that the right is important but not fundamental.

While I do not disagree that the General Assembly has a role in guiding the development of the law, this Court may not abdicate its constitutional obligation by conferring upon that body free reign to do so. As this Court reminded in *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901 (2013), the General Assembly's legislative power is not absolute, as it is expressly restricted by "certain fundamental rights reserved to the people in Article I of our Constitution." *Id.* at 946–47 (citing Pa. Const. art. I, § 25 and *Nat'l Wood Preservers, Inc. v. Commonwealth*, 489 Pa. 221, 414 A.2d 37, 44 (1980)). The fundamental rights set for in Article I are "inherent in man's nature and preserved rather than created by the Pennsylvania Constitution," and are "specific limits" on legislative powers. *Id.* at 947 (citing *Appeal of Lord*, 368 Pa. 121, 81 A.2d 533, 537 (1951), *Appeal of White*, 287 Pa. 259, 134 A. 409, 412 (1926), and *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 896 (1991)). Article I, Section 11 thus constitutes a "specific limit" on the power

of the General Assembly to "guide the development of the law," as it may not do so in ways that deny our citizens their fundamental rights to seek remedies in our courts for injuries inflicted upon them. *Id.* at 947 (citing *O'Neill v. White*, 343 Pa. 96, 22 A.2d 25 (1941), *Commonwealth ex rel. Smillie v. McElwee*, 327 Pa. 148, 193 A. 628 (1937), and *Commonwealth ex rel. McCormick v. Reeder*, 171 Pa. 505, 33 A. 67 (Pa. 1895)). In this regard, I do not see the application of strict scrutiny as a bar to the General Assembly's role in developing the law, but it does require that any infringing legislation be narrowly tailored to achieve a compelling state interest.

As support for its observation that the General Assembly may play a role in "guiding the formation of the law," Lead Op. at 1221, the lead Opinion relies primarily upon this Court's skeletal decision in *Freezer Storage v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715 (1978). In *Freezer Storage*, this Court held that the General Assembly could abolish common law remedies by way of a statute of repose based upon the observation that no citizen has a vested interest in the continued existence of an immutable body of negligence law. *Id.* at 721. There is no limiting principle to this grant of legislative prerogative in *Freezer Storage*. Stunningly, the Court in *Freezer Storage* did not indicate that this power was to any extent restrained by any constitutional limitations. It rejected the notion that statutes of repose could violate Article I, Section 11 without conducting any constitutional analysis or applying any level of scrutiny whatsoever. [8]

***1234** Cases decided since *Freezer Storage* have typically involved situations involving attempts to enforce retroactively legislation that altered a vested legal right. [9] In *Gibson v. Commonwealth*, 490 Pa. 156, 415 A.2d 80 (1980), we addressed the implications of our decision in *Mayle v. Pa. Dept. of Hwys.*, 479 Pa. 384, 388 A.2d 709 (1978), which abrogated the doctrine of sovereign immunity, and the General Assembly's subsequently enacted legislation reinstating it. With respect to the legislature's attempt to have its legislation apply retroactively, we held that Article I, section 11 precluded the Act from governing causes of action accruing before its enactment. *Id.* at 83. In *Ieropoli*, we refused to enforce a new law limiting damages for asbestos-related injuries in a case filed before enactment of the legislation. *Ieropoli*, 842 A.2d at 929-30. In *Konidaris v. Portnoff Law Assoc., LTD*, 598 Pa. 55, 953 A.2d 1231 (2008), we determined that delinquent taxpayers had no right to be free from the payment of attorneys' fees imposed by a statute that included a provision retroactively requiring their payment for prior delinquencies, concluding that the challengers had suffered no injury for which they were entitled to a remedy.

The lead Opinion indicates that "[t]his line of cases" (which presumably includes some combination of *Freezer Storage*, *Gibson*, *Ieropoli* and *Konidaris*), represents "a shift away from treating the constitutional protections inherent in the remedies clause as a fundamental right," and then cites to *Konidaris* for the proposition that "[b]ecause this Court has 'curtailed' the reach of the remedies clause in the past, it follows that the right to a remedy is not a fundamental right." Lead Op. at 1222. No such conclusion follows, for at least two reasons. First, the mention of "curtailing" the reach of the remedies clause was a reference to a single prior case, *Freezer Storage*, in particular its holding that when eliminating common law causes of action, the General Assembly did not have to provide any quid pro quo to injured persons when doing so. *Freezer Storage*, 382 A.2d at 721. This reference was, however, merely dicta, as this legal principle had no application in *Konidaris*. [10] In *Konidaris* ***1235** we concluded that the General Assembly had not abolished any rights or defenses of the delinquent taxpayers at all and as a result Article I, section 11 simply had no application. *Konidaris*, 953 A.2d at 1242 ("They fail to demonstrate, however, how their right not to do something is the same as an affirmative defense against an accrued cause of action, which is premised on an injury done to a person."). We emphasized that the purpose of Article I, section 11 is "the protection from legislative action of an individual's remedy for an injury done," and concluded that "[i]n this case, no injury was done." *Id.*

Second, as with *Konidaris*, neither *Gibson* nor *Ieropoli* reflect any "curtailing" of the scope of Article I, section 11. Quite to the contrary, in these cases the Court applied a foundational principle of Article I, section 11 jurisprudence that may be traced at least as far back as our *Menges* decision in 1859 – namely that Article I, section 11 protects the right of litigants to be free from legislative interference with a vested (i.e., accrued) legal right.

> The law which gives character to a case, and by which it is to be decided (excluding the forms of coming to a decision), is the law that is inherent in the case, and constitutes part of it when it arises as a complete transaction between the parties. If this law be changed or annulled, the case is changed, and justice denied, and due course of law violated.
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> When, therefore, the constitution declares that it is the exclusive function of the courts to try private cases of disputed right, and that they shall administer justice "by the law of the land," and "by due course of law;" it means to say, that the law relating to the transaction in controversy, at the time when it is complete, shall be an inherent element of the case, and shall guide the decision; and that the case shall not be altered, in its substance, by any subsequent law.

Menges, 33 Pa. at 495; *see also* *Kay v. Pa. R.R. Co.*, 65 Pa. 269, 277 (Pa. 1870) ("[W]e are bound therefore to say that this law is retrospective in its operation on this case, deprives the plaintiff of a vested right, and is inoperative."); *Lewis v. Pennsylvania R. Co.*, 220 Pa. 317, 69 A. 821, 823 (1908); *Com. ex rel. Margiotti v. Cunningham*, 337 Pa. 289, 10 A.2d 559, 565 (1940). In *Gibson,* we summarized these cases and others as holding that "[i]t is well-settled that the Legislature may not extinguish a right of action which has already accrued to a claimant." *Gibson,* 415 A.2d at 82. *Gibson* and *Ieropoli* are both textbook applications of this basic principle. In *Gibson*, the Court refused to permit the General Assembly to eliminate retroactively their vested causes of action against the Commonwealth prior to enactment of sovereign immunity legislation. *Gibson*, 415 A.2d at 83. In *Ieropoli*, the Court held that the legislation at issue eliminated the plaintiffs' causes of action and thus held that its "application to [the plaintiffs'] causes of action is unconstitutional under Article I, section 11." *Ieropoli*, 842 A.2d at 930.

These decisions enforced, and in no respect limited, the rights granted in Article I, Section 11. Because they addressed the application of Article I, section 11 to legislative interference with vested rights, it was unnecessary for the Court to determine ***1236** whether the rights granted under that provision were fundamental, and indeed none of the cases addressed that issue at all. The propriety of the legislature's ability to eliminate a prospective (unvested) cause of action was not in question in those cases, as it is here. Here the General Assembly passed the MCARE Act's statute of repose in 2002, prior to the accrual of the Yanakoses' claim in 2003. Enactment of the MCARE Act's statute of repose thus eliminated a **prospective** cause of action for medical malpractice. For present purposes, therefore, the correlative case is *Freezer Storage*, in which the Court acknowledged its understanding that it was confronting a circumstance involving prospective rather than vested legal rights. *Freezer Storage*, 382 A.2d at 720 n.4 ("It should be acknowledged that appellant makes no claim that this statute deprives him of a cause of action which had already accrued to him before the statute became effective.").

As discussed above, in *Freezer Storage* this Court held that the legislature is free to abolish common law causes of action without any constitutional limitations on its legislative prerogative to do so. The Court did not even consider the possibility that Article I, section 11 might require the implementation of necessary constitutional protections before the prospective legal rights of our citizens to a remedy may be eliminated. We have been asked by the Yanakoses in this case to do what was not done in *Freezer Storage* – to decide whether the legislature's ability to abolish causes of action is subject to limitations under Article I, section 11 and, if so, to conduct a constitutional analysis to determine the level of scrutiny that must be employed commensurate with the placement of a remedies clause in Article I of our charter. By subjecting the MCARE Act's statute of repose to intermediate scrutiny, the lead Opinion's decision abrogates *Freezer Storage*, as it places a constitutional limitation on the General Assembly's power to eliminate common law causes of action. My disagreement is certainly not with the lead Opinion's decision to reject *Freezer Storage*, but rather with the level of scrutiny that must be applied. Puzzlingly, the lead Opinion appears to be simultaneously rejecting *Freezer Storage's* unreasoned carte blanche deference to the General Assembly, while at the same time relying on the case to justify its application of intermediate rather than strict scrutiny. The lead Opinion does not explain how *Freezer Storage* could have any precedential value with regard to whether the rights conferred in Article I, section 11 are fundamental, as the case did not even broach the topic (much less decide it). [11]

As I believe that Article I, section 11 is a fundamental constitutional right, I am also of the view that the proper test for determining whether it has been violated is strict scrutiny. *See, e.g.*, *Shoul*, 173 A.3d at 676. To satisfy the requirement of narrow tailoring, there is a heavy burden to justify the statutory scheme at issue by demonstrating that the enactment has been ***1237** "structured with 'precision,' " which in turn requires that the General Assembly has "selected the 'less drastic means' for effectuating its (compelling) objectives." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *DePaul*, 969 A.2d at 553. To say that the statute of repose provision in the MCARE Act was not narrowly tailored is, in my view, self-evident. The statute of repose is just one of numerous procedural and substantive devices included in the MCARE Act to limit or eliminate the availability of remedies to individuals injured by the alleged malpractice of health care providers. [12] The General Assembly adopted these multiple measures without any studied analysis of the impact of any particular measure on the desired legislative goal. Contextually, the statute of repose appears to be an add-on to the unstudied list of multiple restraints to reduce malpractice claims and damage awards in the surviving lawsuits.

The lead Opinion correctly concludes that the MCARE's statute of repose does not even satisfy the test for intermediate scrutiny (that the legislation is "substantially related" to achieving some important governmental interest). The lead Opinion's analysis establishes that there was no evidence to connect the measure with any effect on the legislative goal of reducing malpractice insurance premiums. Concurring Op. at 1232–35. No evidence of record establishes that the MCARE Act's seven-year statute of repose would have a significant effect on medical malpractice insurance rates (particularly given the exceptions for foreign objects cases and those brought by minors). *Id.* at 1234–35.

Given that the MCARE Act's statute of repose cannot meet the less exacting substantial relationship test, it is beyond dispute that the MCARE Act's statute of repose cannot meet the strict scrutiny test. However, by concluding that the right to a remedy is important but not fundamental, the lead Opinion would empower the General Assembly to abolish a cause of action if it can demonstrate a "substantial relationship" to a stated goal. The General Assembly need not establish that the governmental interest is compelling or that the legislative goal could not be accomplished without depriving a citizen of her right to a remedy. The lead Opinion would adopt a rule that will require a deference to the legislative branch that Article I, section 11 does not permit. I cannot agree with the Court's decision to adopt this diluted constitutional analysis. It is our role as the judicial branch of government to scrupulously protect the right to a remedy afforded by Article I, Section 11 and to give it due recognition as a fundamental right. Over centuries of jurisprudence, this Court has heretofore recognized the fundamental nature of this right in the cases in which we took the time to consider its constitutional dimension and the appropriate level of scrutiny to view legislative infringements – strict scrutiny. In a challenge like the one presented here, where the statute, on its face, establishes a plethora of means to achieve the stated governmental interest that are less restrictive than the abolition of a right to a remedy, the unconstitutionality of the MCARE Act's statute of repose should be readily apparent.

For these reasons, I concur in the result, namely that the MCARE Act's statute ***1238** of repose is unconstitutional. I dissent from section II of the lead Opinion's opinion in its entirety. I join in section I and in section III to the extent that this section holds that the MCARE's statute of repose does not even satisfy the test for intermediate scrutiny (and thus plainly would not meet the more exacting test for strict scrutiny).

JUSTICE WECHT, Dissenting

A majority of the Court concludes that the General Assembly's application of a seven-year statute of repose to most medical professional liability claims violates Article I, Section 11 of the Pennsylvania Constitution, which provides that every person who suffers an injury "shall have remedy by due course of law[.]" [1] I am unable to agree. Both the lead Opinion and the Concurring and Dissenting Opinion flout the General Assembly's policymaking authority by constitutionalizing and imposing a standard that neither the text nor the history of our Constitution supports. Because existing jurisprudence supplies a different standard, and because it is not this Court's role to upend duly enacted legislation simply because we might sometimes deem it imperfect or unwise, I must respectfully dissent.

Article I, Section 11, which is part of our Constitution's Declaration of Rights and has remained essentially unchanged since its introduction in the Constitution of 1790, provides that:

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

PA. CONST. art. 1, § 11.

At issue is the right to a "remedy by due course of law" language. This wording is found in the constitutions of at least thirty-nine states, but has no counterpart in the federal constitution. *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 842 A.2d 919, 925 (2004). Such provisions, commonly referred to as remedies clauses, derive from Magna Carta and Sir Edward Coke's seventeenth century commentary on the Great Charter, which influenced the drafters of many early American state constitutions.[2] JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 6-2(a) (3d ed. 2000).

Some state supreme courts have concluded that various statutes of limitations and statutes of repose violate their constitutions' Remedies Clauses.[3] Yet considerable ***1239** disagreement persists among state courts over the correct interpretation of Open Courts provisions and Remedies Clauses. For every decision striking down a statutory restriction on a common law cause of action, one could find another decision (likely in a state with an identical Open Courts provision) upholding a similar restriction. *See* Hon. Thomas R. Phillips, *The Constitutional Right to A Remedy*, 78 N.Y.U. L. REV. 1309, 1314-15 (2003) ("In each section of the country, whether the constitution is old or new, the judges elected or appointed, or the political culture traditional or progressive, some state courts defer unhesitatingly to legislative choices, while others routinely strike down any statutes that impede access to the courts or impair recovery under traditional theories.").

To complicate matters further, the ordinary challenges of constitutional interpretation are magnified because the historical record does not reveal what led the framers of early state constitutions to embrace Open Courts provisions.[4] Those few documents that survive from Pennsylvania's 1790 constitutional convention do not describe any debates about the Open Courts provision generally, nor the Remedies Clause specifically. So it is not clear what the drafters meant when they guaranteed a remedy "by due course of law" for every injury. Perhaps they understood "due course of law" to mean "the law of the land," in which case Article I, Section 11 merely guarantees a right to "whatever remedy the law allows." *See* *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488, 493 (1989) (explaining that Montana's Open Courts provision is "a section dealing with the administration of justice," and is "addressed to securing the right to set the machinery of the law in motion"); *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) ("The constitutional guaranty providing for open courts and insuring a remedy for injuries does not guaranty a remedy for every species of injury, but applies only to such injuries as constitute violations of established law of which the courts can properly take cognizance."). Or maybe the drafters intended to constitutionalize then-existing common law remedies, thus shielding those remedies from legislative modification or abolition absent a constitutional amendment. We don't know.

Faced with this lack of authoritative guidance, Pennsylvania courts—along with many other state courts—have struggled for well over a century to define what, if any, limits the Remedies Clause imposes on the legislature's authority to modify or abolish common law causes of action. Indeed, significant disagreement persists among judges and scholars as to whether the "by due course of law" language found in most Open Courts provisions presupposes that the legislature has the authority to decide what "course of law" is "due" in any given circumstance. Some have questioned why the promise of a remedy for every "injury" necessarily should preclude the legislature from defining what constitutes a "legal injury" in the first instance. ***1240** *See* *Carroll*, 437 A.2d at 399 (Larsen, J., dissenting).

Though these substantial difficulties have resulted in divergent interpretations among and between different courts, the lead Opinion barely mentions them. Instead, the lead Opinion simply takes for granted that intermediate scrutiny "must apply" given the right to a remedy's "historical

significance" and its "explicit inclusion in our constitution." Lead Opinion at 1222. The matter is not so simple. As I explain in more detail below, the "intermediate scrutiny" standard that the lead Opinion adopts is inconsistent with our existing Remedies Clause jurisprudence, and derives from neither the text nor the history of our Constitution.

Although the framers' intent in drafting Pennsylvania's original Open Courts provision is somewhat opaque, the circumstances that precipitated the 1790 constitutional convention are well understood. When Pennsylvania's first Constitution was ratified in 1776, "the legislative branch was seen as the people's servant and salvation," while "the executive branch was distrusted." Marritz, *supra* note 4, at 471. The Pennsylvania Constitution of 1776 reflected this underlying political philosophy. It created a "unitary government in which legislative power, and supervisory power over both the executive and the judiciary, were concentrated in a single annually elected Assembly." Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776-1791*, 67 TEMP. L. REV. 575, 588 (1994). Those limited executive powers that did exist were vested in an elected Supreme Executive Council, which consisted of twelve members. *Id.* The document did not provide for an independent judiciary. Instead, judges were treated as "creatures of the political branches." *Id.*

In the ensuing decades, the citizens of Pennsylvania "became disillusioned with legislative supremacy" following many well-documented abuses of that power. Marritz, *supra* note 4, at 471 (quoting ROSALIND L. BRANNING, A HISTORY OF PENNSYLVANIA CONSTITUTIONS, REFERENCE MANUAL NO. 3, at 5 (1968)). Throughout this era, the legislature all too often exceeded its constitutional authority, obstructed legitimate exercises of executive power, ignored judicial decisions, and disregarded individual liberties. *Id.* (citing Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 922 (1993)). "By the mid-1780s, there was general agreement that 'many of the existing ills could be traced to an impotent judiciary,' " and that Pennsylvania's constitutional system lacked essential safeguards on unchecked legislative power. *Id.* (quoting BRANNING, *supra*, at 4).

In 1789, a substantial majority of the legislature agreed that revisions to the Pennsylvania Constitution were necessary. The product of the ensuing convention—the Constitution of 1790—reflected a dramatic shift in the structure of our state government. Unlike its predecessor, this new Constitution vested executive power in a unitary executive with veto and appointment powers, PA. CONST. of 1790 art. II, created a bicameral legislature consisting of a house and senate, PA. CONST. of 1790 art. I, provided for an independent judiciary, PA. CONST. of 1790 art. V, and explicitly prohibited the legislature from infringing upon any of the individual rights enumerated in the Declaration of Rights. PA. CONST. of 1790 art. IX, § 26.

Given this historical context surrounding the introduction of the Remedies Clause in the Constitution of 1790, I am persuaded by the Yanakoses' argument that Article I, Section 11 should be understood to impose some outer limit on the General Assembly's power to enact legislation that curtails or eliminates a common law cause of ***1241** action. *See Scarnati v. Wolf*, 643 Pa. 474, 173 A.3d 1110, 1118 (2017) (explaining that, when interpreting a provision of the Pennsylvania Constitution, we should "consider the circumstances attending its formation and the construction probably placed upon it by the people"). While the precept that the Superior Court relied upon below—that "no one has a vested right in the continued existence of an immutable body of negligence law" [5] —is an accurate statement of the law, this Court has never held that the General Assembly possesses unlimited power to alter, limit, or abolish common law remedies. *See* *Ieropoli*, 842 A.2d at 925 (remarking that Article I, Section 11 is both an "imperative limitatio[n] on legislative authority" and an "imperative imposition[n] of judicial duty"). [6] Indeed, the earliest decisions on the subject seemed to take for granted that the Remedies Clause to some extent restricts the General Assembly's authority to extinguish existing causes of action.

In *Central R.R. Co. of N.J. v. Cook*, 1 W. N. C. 319 (Pa. 1875)*Central R.R. Co. of N.J. v. Cook*, 1 W. N. C. 319 (Pa. 1875), for example, the Court affirmed a decision striking down a statute that capped the maximum damages recoverable from a railroad corporation at $3,000. In declining to overturn that decision five years later, the Court explained that:

> we are not convinced that [*Central R.R. Co. of N.J.*Central R.R. Co. of N.J.] should be overruled. Its authority is in conservation of the reserved right to every man, that for an injury

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

Thirteenth & Fifteenth St. Passenger Ry. v. Boudrou, 92 Pa. 475, 481-82 (Pa. 1880). [7]

Together with the history of the Remedies Clause and this Court's precedent, the text and structure of the Constitution also support the conclusion that laws infringing the right to a remedy should be subject to some form of heightened judicial scrutiny. The preamble to Article I of the Constitution makes clear that the rights enumerated in the Declaration of Rights are "essential principles of liberty ***1242** and free government" and must be protected from legislative encroachment. PA. CONST. art. 1, pmbl. Similarly, Article I, Section 25 reveals the framers' intent to prohibit all branches of government—including the legislature—from interfering with the exercise of the rights enumerated in the Declaration of Rights. PA. CONST. art. 1, § 25 ("To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.").

For all of these reasons, I am willing to accept that laws which modify traditional common law remedies should be subject to some form of heightened judicial scrutiny. [8] I disagree, however, with the lead Opinion's conclusion that intermediate scrutiny should apply. Contrary to our precedent, [9] the lead Opinion's chosen standard "encroach[es] upon the Legislature's ability to guide the development of the law" and "place[s] certain rules of the 'common law' and certain non-constitutional decisions of courts above all change except by constitutional amendment." *Freezer Storage*, 382 A.2d at 721. As this Court has cautioned in prior cases, "societal conditions occasionally require the law to change in a way that denies a plaintiff a cause of action available in an earlier day[.]" *Id.* at 720 (citing *Jackman v. Rosenbaum Co.*, 263 Pa. 158, 106 A. 238, 244 (1919)). While it is not often that the legislature decides that a common law theory of recovery has outlived its useful life, neither is it unprecedented. *See*, *e.g.*, 23 Pa.C.S. § 1902 ("All causes of action for breach of contract to marry are abolished."); 23 Pa.C.S. § 1901 ("All civil causes of action for alienation of affections of husband or wife are abolished."). This Court itself has not hesitated to abrogate common law anachronisms. Consider, for example, the tort of criminal conversation—an action that could be brought against a third party who "engaged in at least a single act of sexual intercourse" with the plaintiff's spouse. *See* *Fadgen v. Lenkner*, 469 Pa. 272, 365 A.2d 147, 149 (1976).

These concerns evince the principle that a legislature, like a court, may from time ***1243** to time recognize that life and experience have consigned a common law rule to obsolescence, leaving that rule subject both to judicial modification and to statutory revision. Our own expressions throughout our Article I, Section 11 case law have, for at least a century, harmonized consistently with this perspective. [10] It follows that the intermediate scrutiny standard fails to afford the legislature sufficient latitude to modify traditional common law remedies. In other words, today's decision impedes and flouts the General Assembly's policymaking authority, thus countenancing the very "stagnation of the law in the face of changing societal conditions" that this Court has warned our Constitution does not mandate. *Freezer Storage*, 382 A.2d at 720 (quoting *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897, 903 (1975)). Rather than embrace a test that is manifestly incompatible with our existing Remedies Clause jurisprudence, I would follow the lead of the many courts which have held that the legislature may abrogate or modify a common law cause of action in response to a clear social or economic need, so long as the challenged legislation bears a rational and non-arbitrary connection to that need. [11] This standard strikes the appropriate balance between the two primary concerns expressed in our prior cases: (1) guarding the constitutional right to a remedy; and (2) affording the people's representatives necessary and proper latitude to shape public policy.

Applying this standard, I would conclude that the General Assembly's imposition of a seven-year statue of repose on most medical malpractice claims bears a rational and non-arbitrary connection to a clear economic need. As an initial matter, the Yanakoses appear to concede the economic need for the MCARE Act's reforms. The Yanakoses do not dispute that the General Assembly imposed the seven-year statute of repose to preclude the filing of aged lawsuits, which increase the cost of medical professional liability insurance in the Commonwealth, which, in turn, increases the overall cost of health care services. *See* Brief for the Yanakoses at 25; *see also* 40 P.S. § 1303.102(3) ("To maintain [a comprehensive and high-quality health care] system, medical professional liability insurance has to be obtainable at an affordable and reasonable cost in every geographic region of this Commonwealth."). Thus, there can be no real dispute that the General Assembly has an important interest in ensuring both that Pennsylvania physicians have access to affordable malpractice insurance and that Pennsylvania citizens have access to affordable medical care. Nor could anyone dispute that there is a "clear social or ***1244** economic need" for an affordable and well-regulated health care system.

Rather than challenge the economic necessity of the MCARE Act, the Yanakoses argue that the statute of repose is unconstitutional because it creates arbitrary distinctions between classes of medical malpractice victims. In this regard, the Yanakoses stress that the statute of repose does not apply to injuries caused by a foreign object that has been negligently left inside a patient's body. *See* 40 P.S. § 1303.513(b). According to the Yanakoses, this exception to the statute of repose "arbitrarily protects the right of certain victims of malpractice to seek a remedy while closing the courthouse doors to other victims who are similarly situated." Brief for the Yanakoses at 28.

The foreign-object exception to the statute of repose does not render the statute arbitrary or irrational. There are persuasive and wholly non-arbitrary reasons for the MCARE Act's unique treatment of foreign object cases. First, cases that fall within the foreign-object exception are almost certainly rare. *See Fessenden v. Robert Packer Hosp.*, 97 A.3d 1225, 1233 (Pa. Super. 2014) (noting that "sponge left behind" cases are uncommon in Pennsylvania). Second, it is conceivable that a foreign object concealed in a patient's body would be more likely than other manifestations of medical negligence to go unnoticed for many years. Finally, foreign object cases, unlike other cases of medical negligence, generally will not involve difficult problems of proof, since the discovery of the foreign object is itself compelling evidence of some earlier negligent act. *See* *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 573 Pa. 245, 824 A.2d 1140, 1147 (2003) (discussing the application of *res ipsa loquitur* in " 'sponge left in the patient' cases"). This means that, while the mere passage of time can make non-foreign object cases difficult (and expensive) to defend against, foreign object cases are less likely to be compromised by changing standards of care, waning memories of witnesses, or the unavailability of relevant documents. Given these significant differences, the General Assembly's decision to exempt foreign object cases from the statute of repose was neither arbitrary nor irrational. [12]

Furthermore, even if I agreed with the lead Opinion's invocation of intermediate scrutiny, I would still uphold the MCARE Act's statute of repose. As the lead Opinion explains, to pass intermediate scrutiny, the law in question must be substantially related to an important governmental objective. Lead Opinion at 1222; *see* *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). As explained above, the Yanakoses do not dispute (nor could they, really) that ensuring access to affordable liability insurance for medical professionals, thus ensuring access to affordable medical services for patients, is an important governmental objective. The only question, then, is whether the MCARE Act's statute of repose is substantially related to the objective of reducing the cost of medical professional liability insurance. It is. One need not be an expert in the economics of the insurance industry to understand that the cost of insurance coverage corresponds generally with the ***1245** insurer's own costs, which will decrease when fewer aged claims are filed. [13] Because the statute of repose advances the underlying objective of reducing the cost of malpractice insurance, it withstands intermediate scrutiny.

In support of its holding, the lead Opinion advances a novel suggestion: to wit, that the intermediate scrutiny standard requires "evidence in the legislative history" explaining "how the General Assembly arrived at a seven-year statute of repose with exceptions for foreign objects cases and minors." Lead Opinion at 1225. This is startling. With this test in hand, lawyers are now charged with the duty of mining house and senate journals and committee reports in an effort to satisfy judges that lawmakers have been, in effect, 'reasonable enough.' The lead Opinion's new legislative-history-inspection-standard resembles a homework assignment for the General Assembly,

an assignment this Court is not authorized to give. As a matter of law, the General Assembly need not "cite ... statistics" (*see id.*) so as to anticipate and satisfy a prospective reviewing court that a shorter statute of repose would have been inadequate to achieve the legislature's goal of reducing medical malpractice insurance premiums. Citation of supporting statistics on the house or senate floor is not a judicial approval checklist item to be prescribed by this or any other court. This is an exacting, even imperial, standard that ignores the manner in which judicial review works.

In essence, the lead Opinion concludes that the seven-year statute of repose is both overinclusive (because a longer repose period might have reduced medical malpractice insurance premiums just as well as a shorter one) and underinclusive (because minors and foreign-objects plaintiffs are exempt from the statute of repose). *Id.* at 1225–26. But the intermediate scrutiny inquiry that the lead Opinion itself adopts does not require that the General Assembly choose the least restrictive means available to achieve its objective. *See* *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (discussing the narrow tailoring requirement associated with strict scrutiny). Intermediate scrutiny requires only a substantial relation between a legislature's goal and the means that it selected to achieve that goal. Whether a different law also might have achieved the legislature's goal is not a question for this Court. The standard of scrutiny that the lead Opinion adopts is intermediate in name only. In substance, today's decision simply invites judges to substitute their own public policy views in the place of arguably imperfect, but duly enacted, legislation. Nothing in the text or history of Article I, Section 11 sanctions this judicial second-guessing of the General Assembly's policy decisions. There is of course no end to such a court-as-supervisor enterprise.

In sum, I would hold that statutes which modify or abolish common law causes of action violate Article I, Section 11 of the Pennsylvania Constitution unless the challenged ***1246** legislation is supported by a clear social or economic need for reform. If a law is not supported by such a need, or if the means chosen to address the social or economic problem are arbitrary or irrational, then the law is unconstitutional. Because I would find that the MCARE Act's statute of repose satisfies this benchmark, I would affirm the decision of the Superior Court.

All Citations

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Footnotes

1 40 P.S. §§ 1303.101-1303.910.

2 Our summary of these facts is based upon the allegations in the Yanakoses' complaint. While Appellees contest many of these allegations, the disputed facts were not submitted to a fact-finder because the trial court granted Appellees' motion for judgment on the pleadings. *See* *Cagey v. Commonwealth*, 645 Pa. 268, 179 A.3d 458, 463 (2018) (explaining our standard of review over a decision sustaining a judgment on the pleadings requires us to determine whether, on the facts asserted in the plaintiff's complaint, the law makes recovery impossible).

3 Statutes of repose place a temporal boundary on the right to bring a civil action. Unlike statutes of limitations, which begin to run only after a cause of action has accrued, a statute of repose's time limit is measured from the date of the defendant's last culpable act or omission, regardless of when the injury occurred or was discovered. This means that a statute of repose, unlike a statute of limitations, may bar a plaintiff's suit before his or her cause of action even arises. *Vargo v. Koppers Co., Eng'g & Constr. Div.*, 552 Pa. 371, 715 A.2d 423, 425 (1998). Statutes of repose constitute a legislative judgment that a particular class of defendants should be free from liability after a fixed number of years.

4 In *Freezer Storage*, the appellant had sued the construction company that originally installed insulation material in a warehouse ceiling that eventually collapsed. *Freezer Storage*, 382 A.2d at 717. The defendant

asserted the twelve-year statute of repose precluded the action because it completed the construction more than twelve years before the appellant commenced its lawsuit. *Id.* at 718.

5 *See* *Dolan v. Linton's Lunch*, 397 Pa. 114, 152 A.2d 887, 892 (1959) (suggesting that the General Assembly cannot "enact a law which vitiates an existing common-law remedy without concurrently providing for some statutory remedy"); *see also* *Greer v. U.S. Steel Corp*, 475 Pa. 448, 380 A.2d 1221, 1223 n.6 (1977) (same).

6 Because we are reviewing the trial court's order sustaining judgment on the pleadings, our standard of review is to determine whether, based on the facts the plaintiffs pled, "the law makes recovery impossible." *Cagey*, 179 A.3d at 463. Moreover, the constitutionality of a statute is a question of law, over which our standard of review is de novo, and our scope of review is plenary. *Pa. Envtl. Def. Found. v. Commonwealth*, 640 Pa. 55, 161 A.3d 911, 929 (2017).

7 The Yanakoses argue, in the alternative, that we should apply strict scrutiny to laws that interfere with the right of access to the courts. They contend that strict scrutiny is warranted because "the right of injured parties to seek redress before a court of law" is a "fundamental right" that is "deeply ingrained in our system of liberties." Yanakoses' Brief at 21-22 (citing *Grutter v. Bollinger*, 539 U.S. 306, 326-27, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003)).

8 The four Appellees in this matter have filed two separate briefs. Although Appellees all offer similar arguments, when necessary to distinguish between the two filings, we will refer to the brief filed by UPMC and University of Pittsburgh Physicians as "UPMC's Brief" and the brief filed by Dr. Shaw-Stiffel and Dr. Marcos as "Physicians' Brief."

9 Although Appellees maintain that strict scrutiny is not warranted, they suggest that the statute of repose, and the exceptions to it, are narrowly tailored to further the Commonwealth's important interest in controlling the cost of medical professional liability insurance. UPMC's Brief at 37.

10 See, e.g., *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 999 (Ala. 1982); *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961, 966 n.2 (1984); *State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107, 110 (Mo. 1979).

11 As introduced, the Remedies Clause provided: "That all **courts** **shall** be **open**, and every freeman for an injury done him in his lands, goods, person or reputation, **shall** have remedy by the due course of law, and right and justice administered to him without sale, denial or delay." This language is similar to Lord Coke's commentary on the Magna Carta: "[E]very Subject of this Realm, for injury done to him [either in his goods, lands, or person], by any other Subject ... may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without denial, and speedily without delay." EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55-56 (1681), *available at* http://lawlibrary.wm.edu/wythepedia/library/CokeSecondPartOfInstitutesOfTheLawsOfEngland1681.pdf.

12 As the *Konidaris* Court determined, inasmuch as *Dolan v. Linton's Lunch* stood for the proposition that the legislature may not abolish a judicially recognized cause of action, it was *dicta* and was expressly not followed by this Court.

13 At least four other states have applied intermediate scrutiny to invalidate statutes of repose as unconstitutional. *See* *Lankford*, 416 So.2d at 1001 (declaring its "review is directed to the question whether a substantial relationship exists between the [social] evil and the legislature's attempt to eradicate the evil."); *Hanson v. Williams County*, 389 N.W.2d 319, 328 (N.D. 1986) (declaring unconstitutional a products liability statute of repose because it did not have "a close correspondence to the legislative goals"); *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 464 A.2d 288, 295 (1983) (invalidating products liability statute of repose under intermediate scrutiny because it was not "substantially related to a legitimate legislative object");

Berry, 717 P.2d at 683 (concluding products liability statute of repose was unconstitutional because it did not "reasonably and substantially advance the stated purpose of the statute").

14 Unlike the rational basis test, intermediate scrutiny does not evaluate the reasonableness or arbitrariness of legislation. *See, e.g.*, *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 642 Pa. 236, 170 A.3d 414, 458 (2017) ("If the rational basis test applies, then the classification in question must be 'reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation.' " (quoting *Commonwealth v. Albert*, 563 Pa. 133, 758 A.2d 1149, 1151 (2000)); *Commonwealth v. Parker White Metal Co.*, 512 Pa. 74, 515 A.2d 1358, 1365 (1986) (explaining rational basis analyzes the legislation's reasonableness, arbitrariness, and relation to its objective).

15 We recognize *James* involved an equal protection challenge invoking the right to a remedy, and we find no reason to treat differently a direct challenge under Article I, Section 11.

16 The American Medical Association issued model legislation, which contains a shorter repose period. It provided all causes of action must be commenced within two years, except foreign objects cases, which must be commenced within four years: "The time within which an action must be commenced shall not be extended by any of the provisions of this section including those relating to the discovery of foreign objects beyond four years after the date of the act, omission or failure giving rise to such action." Am. Med. Ass'n, Dep't of State Legislation, *Statute of Limitations in Medical Injury Cases* (1985), *available at* https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/specialty% 20group/arc/limitation.pdf. Further, it applied to "all persons regardless of minority or other legal disability, except that a minor under the full age of eight (8) years shall have until his/her tenth birthday to file suit based on a cause of action which accrued prior to his/her eighth birthday."

17 "[T]he discovery rule tolls the statute of limitations where the plaintiff is reasonably unaware that he has been injured and that his injury has been caused by another party's conduct." *Nicolaou v. Martin*, —— Pa. ——, 195 A.3d 880, 892 (2018).

18 Minors under 13 years old at the time of their injury have more than seven years to commence their actions because the statute of repose permits them to file a lawsuit until their twentieth birthday. For example, a 12-year-old malpractice victim would have until their twentieth birthday to file suit, which is more than the seven-year repose period. Thus, the younger a minor is at the time of the alleged malpractice, the longer the minor has to timely file suit before the statute of repose bars their claim.

19 The dissent mischaracterizes our review as imposing a requirement on the legislature to provide evidence in support of its legislation. To be clear, Appellees have the burden to show the challenged statute of repose passes intermediate scrutiny. The legislative history could be a source of evidence establishing a substantial relationship. However, here, the legislative history does not demonstrate any justification for the seven-year statute of repose. While this is not dispositive, it does not support Appellees' position. *See* *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 393-94, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984) (looking at legislative history in analyzing whether legislation substantially advanced governmental purpose).

20 For these reasons, the statute of repose is not constitutional even under the dissent's formulation of "heightened scrutiny" because the seven-year limitation is arbitrary. *See also* *DeYoung v. Providence Med. Ctr.*, 136 Wash.2d 136, 960 P.2d 919, 925 (1998) (en banc) (concluding an eight-year statute of repose for medical malpractice claims was unconstitutional under the rational basis test because "[t]he relationship between the goal of alleviating any medical insurance crisis and the class of persons affected by the eight-year statute of repose is too attenuated" where evidence presented to the legislature showed less than 0.5 percent of claims were reported more than eight years after the underlying occurrence).

1 *See* Donald Marritz, *Courts to be Open; Suits Against the Commonwealth: Article 1, Section 11, in The Pennsylvania Constitution: A Treatise On Rights and Liberties*, 14.4(c) & n.170 (2004) (hereinafter, the "*Gormley Treatise*"). According to the Gormley Treatise, "[a]lthough at times there may have been confusion between the terms 'due process' and 'due course of law,' it is generally accepted that they are different."

Id. at 14.4(c) (citing *Baggs's Appeal*, 43 Pa. 512, 517)). The right to due process protects people from deprivations of property or liberty by the government, except "by the law of the land." *Id.* Conversely, the right to "due course of law" provides an "independent guarantee of legal remedies for private wrongs by one person against another, through the state's judicial system." *Id.* (quoting Hans Linde, *Without "Due Process,"* 49 Or. L. Rev. 125 (1970)).

2 In the trial court, counsel for the Yanakoses provided notice to the Attorney General of Pennsylvania pursuant to Rule 235 of the Pennsylvania Rules of Civil Procedure regarding their challenge to the constitutionality of 40 P.S. § 1303.513. In the Superior Court and again in this Court, counsel provided similar notices pursuant to Rule 521(a) of the Pennsylvania Rules of Appellate Procedure. The Attorney General did not enter an appearance in any of these proceedings in response to these notices.

3 In summarizing challenges to infringement of "important rights," the Court cited to Professor Laurence Tribe's description of them as a significant interference with "liberty or a denial of a benefit vital to the individual." *James*, 477 A.2d at 1306 (quoting L. Tribe, *American Constitutional Law* § 16-31 (1978)).

4 For the same reason, this Court in *Zauflik* applied intermediate scrutiny rather than strict scrutiny to an equal protection challenge to statutory damages caps on recoveries under the Tort Claims Act, 42 Pa.C.S. §§ 8501–8564. *Zauflik*, 104 A.3d at 1120. We held that the "right" to a full tort recovery "is not a fundamental right warranting strict scrutiny because the predicate right to bring suit against the Commonwealth or its political subdivisions is expressly limited" by, inter alia, "Article I, Section 11 of the Pennsylvania Constitution, which permit[s] the General Assembly to limit recovery against governmental units." *Id.* at 1119. Because we concluded that "the right involved is an 'important' one," we applied the intermediate scrutiny test set forth in *James* to decide "whether the Act's damages cap closely serves an important governmental interest, in this instance, the protection of the public treasury against large and unpredictable tort recoveries." *Id.*

5 As indicated above, in *James* we also cited with approval the United States Supreme Court's definition in *Plyler* of "fundamental rights." *James*, 477 A.2d at 1306. Applying this definition of "fundamental rights," the right to a remedy in suits against private entities clearly "has its source, explicitly or implicitly," in Article I, Section 11 of the Pennsylvania Constitution, and is thus a fundamental right.

6 In *DePaul*, this Court found that a complete ban on political contributions to individuals affiliated with the gaming industry violated Article I, Section 7's guarantee of freedom of expression and association because it was not narrowly tailored to achieve the General Assembly's compelling interest in negating the corrupting influence and appearance of large contributions. *DePaul*, 969 A.2d at 553. This Court held that merely limiting the size of contributions, rather than prohibiting them entirely, "would be more narrowly drawn to accomplish the stated goal." *Id.*

7 The United States Constitution has no counterpart to Article I, Section 11 of the Pennsylvania Constitution.

8 Rather than conduct any constitutional analysis, the *Freezer Storage* Court merely cited to three prior decisions, also devoid of any constitutional analysis, to support its decision. None of these cases provides any substantive support for its contention that the General Assembly may abrogate common law causes of action as it so chooses. *Id.* at 720-21. Of these three cases, one involved a genuine anachronism, specifically, that a husband may not sue a third party for an act of sexual intercourse with his wife, a cause of action historically based upon the outdated notion that a wife, like a servant, was the husband's personal property. *Fadgen v. Lenkner*, 469 Pa. 272, 365 A.2d 147, 149 (1976). In the second case, *Jackman v. Rosenbaum Co.*, 263 Pa. 158, 106 A. 238 (1919), the Court refused a claim for damages, stating that Article I, Section 11 was limited to actual legal injuries, not those "suffered" pursuant to a centuries-old statute permitting the complained-of behavior. *Id.* at 241; *see Gormley Treatise* § 14.4[g][1] (noting that *Jackman* is "cited in virtually every subsequent remedies case, but without any mention of the context – that the plaintiff was asking the court to overcome a statute whose principles had been established for hundreds of years"). The third case, *Sherwood v. Elgart*, 383 Pa. 110, 117 A.2d 899 (1954), rejected a challenge to an obscure

statute that slightly modified the liability of innkeepers who provided safe deposit facilities. This Court did so without any discussion or explanation, *id.* at 902 ("after considering appellees' contention we find it to be without merit"), and whether the Court considered the substance of any arguments proffered by the appellees is entirely speculative. Again, and significantly, in none of these three cases did the Court conduct a constitutional analysis – strict scrutiny or otherwise.

9 In *Lewis v. Pennsylvania R. Co.*, 220 Pa. 317, 69 A. 821 (1908), the Court defined a "vested right" as follows: "It must be something more than a mere expectation, based upon an anticipated continuance of existing law. It must have become a title, legal or equitable, to the present or future enforcement of a demand, or a legal exemption from a demand made by another." *Id.* at 823.

10 Despite this reference in *Konidaris* to *Freezer Storage*, the Court gave no weight to its decision. While *Freezer Storage* had presumably held that the General Assembly was free to abolish common law causes of action with impunity without providing a quid pro quo to the injured person, the Court in *Konidaris* ignored this holding entirely, indicating that Pennsylvania courts (among others) continue to "vacillate" on these issues:

> While courts in this Commonwealth and across the country vacillate along the spectrum from holding sacrosanct any injury that was protected under common law at the time a state adopted its constitution, to allowing for revision only where the legislature supplies a quid pro quo remedy, to allowing the legislature free reign to redefine what is a 'legal injury,' all agree that the legislative branch cannot dissolve a right to recover once a case accrues.

953 A.2d at 1242 (citing David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1206 (1992)).

11 We may well question whether *Freezer Storage* has any Article I, section 11 precedential value at all, given its complete lack of any substantive constitutional analysis. This Court has held that decisions devoid of reasoned analysis have "very little if any precedential value." *William Penn Sch. Dist. v. Pa. Dept. of Educ.*, 642 Pa. 236, 170 A.3d 414, 443 (2017) (citing *Ario v. Reliance Ins. Co.*, 602 Pa. 490, 980 A.2d 588, 598 (2009) (Saylor, J., concurring)); *cf.* Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 Stan. L. Rev. 2017, 1050 (2002) ("[J]udicial decisions are precedential authority unless they contain a negligible amount of legal reasoning ... [and the] act of adjudication alone ... cannot sustain the precedential authority of a decision that is not solidly grounded in legal reasoning.").

12 In addition to the statute of repose, the MCARE Act eliminated, inter alia, the collateral source rule, 40 P.S. § 1303.508; the prohibition on reducing damages to present worth, 40 P.S. § 1303.510; the allowance of lump sum awards for future damages, 40 P.S. § 1303.509; and the plaintiff's choice of forum.

1 PA. CONST. art. 1, § 11.

2 Magna Carta included the following promise from King John aimed at curtailing the selling of court writs: "To no one will we sell, to no one will we refuse or delay, right or justice." In his commentary on this article, Lord Coke wrote that "every Subject of this Realm, for injury done to him in [goods, lands, or person], ... may take his remedy by the course of the Law." JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 6-2(a) (3d ed. 2000).

3 *Reynolds v. Porter*, 760 P.2d 816 (Okla. 1988) (invalidating a three-year limitations period without discovery rule in medical malpractice suits); *Hanson v. Williams Cty.*, 389 N.W.2d 319 (N.D. 1986) (invalidating ten-year date-of-use statute of repose for products-liability claims); *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. 1986) (finding statute of limitations in medical malpractice case unconstitutional as applied to minors); *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984) (invalidating absolute limitations bar on medical malpractice claims three years from date of injury); *Jackson v. Mannesmann Demag*

Corp., 435 So.2d 725 (Ala. 1983) (invalidating a seven-year statute of repose for claims against architects, contractors, and builders).

4 *See* Donald Marritz, Courts to be Open; Suits Against the Commonwealth: Article I, Section 11, in THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES, 455, 470 (Ken Gormley, et al. eds., 2004) (explaining that notes from Pennsylvania's 1790 constitutional convention do not clarify the thinking behind the Open Courts provision); Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202, 1203-1204 (1964) ("[R]ecords of the constitutional conventions which adopted certain-remedy clauses are virtually devoid of any clues as to the intentions of the framers.").

5 *See* *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A.2d 715, 720 (1978) (internal quotation marks omitted).

6 In this regard, I observe that, in the medical malpractice context, some state courts have struck down laws that limit noneconomic damage awards and laws that require claims to be screened by medical experts before they can be filed in court. *Kentucky v. Claycomb*, 566 S.W.3d 202 (Ky. 2018) (invalidating a statute requiring submission of certain medical malpractice claims to a review panel before filing a civil action in court); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (invalidating a $500,000 cap on noneconomic damages in medical malpractice cases); *State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (invalidating a statute requiring submission of claims to a review board before filing a civil action in court). No such provision is before us today, and I express no opinion as to the constitutionality of any such measure.

7 *Accord* THOMAS R. WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 160 (1907) (explaining that the Remedies Clause "stands ... as a barrier to any action by the Legislature tending to interfere with a man's right to sue and recover for an injury which he has suffered").

8 *See* text accompanying n.11. In arguing that "a heightened level of scrutiny" should apply to laws which alter or abolish traditional common law remedies, the Yanakoses contend that the lower courts erred in reviewing "the issues in this case under the rational basis test[.]" Brief for the Yanakoses at 17-18. The Yanakoses ask this Court instead to apply either intermediate or strict scrutiny, *id.* at 18-22, but they also cite approvingly to legal standards adopted by other state courts, which do not perfectly track the familiar due process standards of rational basis, intermediate scrutiny, and strict scrutiny. *See id.* at 46-50 (discussing decisions from the Utah and Alabama supreme courts).

9 Unable to marshal any precedent to support today's holding applying intermediate scrutiny, the lead Opinion invokes *James v. Southeastern Pennsylvania Transportation Authority*, 505 Pa. 137, 477 A.2d 1302 (1984) and *Smith v. City of Philadelphia*, 512 Pa. 129, 516 A.2d 306 (1986), neither of which are Remedies Clause decisions. Rather, *Smith* and *James* involved Fourteenth Amendment Equal Protection Clause challenges, which is why it is unsurprising that those Courts applied intermediate scrutiny. To make matters worse, the lead Opinion fails to recognize that the portion of the *Smith* decision that applied "an intermediate standard of review" did not garner support from a majority of the Court. In fact, Justice Flaherty's Equal Protection Clause analysis in *Smith* was joined only by a single justice, who himself wrote separately to clarify that "not all legislative restrictions which impact upon access to the courts" will require the application of intermediate scrutiny. *Smith* 516 A.2d at 312 (Nix, C.J., concurring). In other words, there is no support for the lead Opinion's holding that intermediate scrutiny applies for purposes of the Remedies Clause; indeed, our relevant decisions suggest quite the opposite. *See*, *e.g.*, *Freezer Storage*, 382 A.2d at 720 (upholding a twelve year statute of repose).

10 *See*, *e.g.*, *Carroll v. York Cty.*, 496 Pa. 363, 437 A.2d 394, 397 (1981); *Freezer Storage*, 382 A.2d at 720; *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897, 903 (1975); *Jackman v. Rosenbaum Co.*, 263 Pa. 158, 106 A. 238, 244 (1919).

11 *See, e.g.,* *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W.Va. 720, 414 S.E.2d 877, 884 (1991) (explaining that legislation implicating the Remedies Clause of the West Virginia Constitution will be upheld if "the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose"); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680-81 (Utah 1985) (explaining that abrogation of a remedy or cause of action is constitutionally justified if "there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective"); *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 1000 (Ala. 1982) (holding that legislation which abolishes or alters a common law cause of action is unconstitutional unless it "eradicates or ameliorates a perceived social evil").

12 The exception to the statute of repose for malpractice claims brought by or on behalf of minors, 40 P.S. § 1303.513(c), is similarly a rational and non-arbitrary means to address a clear social and economic predicament. The General Assembly undoubtedly recognized that minors, who cannot assert medical negligence claims on their own behalf, should be given a fair opportunity to bring their claims after reaching the age of majority. Indeed, the Yanakoses acknowledge that this exception is "narrowly tailored," and that its "application fully encompasses its purpose." Brief for the Yanakoses at 29.

13 *See generally* U.S. Gen. Accounting Office, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates*, 16 (June 2003), *available at* https://www.gao.gov/new.items/d03702.pdf ("Incurred losses are the largest component of medical malpractice insurers' costs. For the 15 largest medical malpractice insurers in 2001—whose combined market share nationally was approximately 64.3 percent—incurred losses (including both payments to plaintiffs to resolve claims and the costs associated with defending claims) comprised, on average, around 78 percent of the insurers' total expenses. Because insurers base their premium rates on their expected costs, their anticipated losses will therefore be the primary determinant of premium rates.").

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CHAPTER 10

Free Expression Versus Reputation

The Supreme Court's Weighing of Interests

CARL A. SOLANO AND EDWARD J. SHOLINSKY

The Supreme Court of Pennsylvania has consistently touted the protections provided by the Commonwealth for freedoms of speech and press. As the Court explained in *Pap's A.M. v. City of Erie*, "Freedom of expression has a robust constitutional history and place in Pennsylvania. The very first Article of the Pennsylvania Constitution consists of the Pennsylvania Declaration of Rights, and the first section of that Article affirms, among other things, that all citizens 'have certain inherent and indefeasible rights.' Among those inherent rights are those delineated in § 7, which address 'Freedom of Press and Speech; Libels.'"[1]

The Court observed that Article I, Section 7 is broader than the federal Constitution's First Amendment in that it "affirms the 'invaluable right' to the 'free communication of thoughts and opinions,' and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused."[2] In the long history of the Commonwealth, however, the Court has struggled to match this broad expression of freedom with concerns about its "abuse." That tension is most clearly reflected in the Court's decisions on the law of defamation.

I. THE FOUNDATIONAL PERIOD

The Commonwealth's solicitude for freedom of expression has been traced to its founder, William Penn, and his prosecution in 1670 "for the 'crime' of preaching to an unlawful assembly."[3] As set forth in the preceding chapter, Penn's *Frame of Government of Pennsylvania* guaranteed freedom of conscience and religious worship.[4] While other forms of free expression were not formally guaranteed, the colony's Quaker-based tolerance influenced some early legal decisions. For example, when William Bradford, the first American printer south of Boston, was tried in 1682 for seditious libel because he criticized Pennsylvania officials for straying from Quaker values, he was allowed to defend himself by arguing that his statements were true and, therefore, not seditious—a startling break from the contemporary view that truth was irrelevant to the crime of libel.[5]

Four decades later, when Philadelphia lawyer Andrew Hamilton went to New York to defend a former Bradford apprentice, John Peter Zenger, in another libel prosecution, Hamilton echoed Bradford's argument and obtained an acquittal by the jury, despite the New York court's refusal to allow truth as a justification. Hamilton's ringing defense of the freedom to tell the truth was published throughout the colonies—particularly through Benjamin Franklin's widely read *Pennsylvania Gazette*—and helped shape a new public view of freedom of expression that again has been recognized by the Supreme Court as a foundational basis for Pennsylvania press freedoms.[6] Against this background, Pennsylvania in 1776 became the first state to protect "freedom of speech, and of writing, and publishing,"[7] making it "the flagship of free expression in the early Republic."[8]

The freedom was not unbounded, however, and scholars have contended that freedom of speech often did not extend to the views of those out of power.[9] The Supreme Court's 1788 decision in *Respublica v. Oswald*[10] illustrates the problem. Oswald, while on bail after being charged with libel, published an article accusing members of the Court of bias because of their political views. The Court cited Oswald for contempt because his article might prejudice the public and corrupt justice. Oswald argued that the Constitution gave him the freedom to speak freely and without restraint, but the Court, in an opinion by Chief Justice McKean, rejected that view, explaining, "The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and to defame."[11] The Constitution was not intended to make libel "sacred," and "good government" could punish abuse of the liberty of speech.[12]

Two years later, Chief Justice McKean chaired a committee of the whole during the framing of a new state Constitution.[13] The free speech provisions were redrafted to state that "no law shall ever be made to restrain the rights" of a free press, truth "may be given in evidence" in prosecutions for publications about public officials or conduct, "[t]he free communication of thoughts and opinions is one of the invaluable rights of man," and "every citizen may freely speak, write, and print on any subject"—but that those who do so are "responsible for the abuse of that liberty."[14] The new Constitution also recognized a right of "acquiring, possessing, and protecting property and reputation."[15]

In the years after the adoption of Pennsylvania's 1790 Constitution, the Supreme Court reiterated the view that libels are so destructive of society that they can readily be

punished, both criminally and civilly.[16] In *Runkle v. Meyer*,[17] the Court considered whether the publisher of a third person's defamatory article could be sued for libel without violating press freedoms, and the Court had no hesitancy in answering affirmatively, comparing the publisher to one who "bespatters another's clothes with filth, as he passes the street, though at the instigation of a third person."[18]

Meanwhile, the turn of the nineteenth century found the Commonwealth embroiled in the heated political debates that accompanied the dawn of political parties at and following the end of President Washington's administration. Much of the controversy swirled around the caustic attacks made on President Adams and his fellow Federalists by a Philadelphia newspaper, the *Aurora*, which was published by Benjamin Franklin Bache (grandson of the famed publisher of the *Pennsylvania Gazette*) and his successor, William Duane. The attacks led to enactment of the federal Sedition Act of 1798,[19] which punished speech critical of the government. Duane was prosecuted under the act, but the statute expired after the election of the Federalists' opponents, led by Thomas Jefferson, and Duane was not tried.[20] Meanwhile, popular opposition to heavy-handed enforcement of the Sedition Act gave rise to the modern American theory that criticism of government actors is a fundamental aspect of the right of free expression.[21]

Although Pennsylvania played a major role in this critical evolution of the theory of free expression, its Supreme Court did not. As late as 1805, the Court continued to espouse a theory of seditious libel that was more in tune with the Sedition Act than its repeal. Thus in *Respublica v. Dennie*,[22] the Court addressed an action to punish Joseph Dennie, the editor of the Jeffersonian journal the *Port Folio*, for publishing views critical of certain forms of democracy. The Court held that the Constitution did not forbid prosecution of Dennie for seditious libel because his comments could be considered an "abuse" of the privilege of free speech. There is a difference, the Court explained, between publishing "temperate investigations of the nature and forms of government" and "those which are plainly accompanied with a *criminal intent*, deliberately designed to unloosen the social band of union, totally to unhinge the minds of the citizens and to produce popular discontent with the exercise of power."[23] The Court left it to the jury to determine whether Dennie had abused his privilege. The jury acquitted.[24]

II. THE NINETEENTH AND EARLY TWENTIETH CENTURIES

Throughout the rest of the nineteenth century and much of the twentieth, the right of free expression under the Pennsylvania Constitution played little role in Pennsylvania legal development in general and in the formulation of defamation law in particular. Scholars have observed that this generally was a period of state constitutional dormancy with respect to individual rights; indeed, when courts began to focus on constitutional rights in the twentieth century, they did so mainly with respect to the federal rights applicable

to the states under the Fourteenth Amendment to the US Constitution, which was added in 1868.[25]

Rather than viewing defamation as an exception to the right of free speech that should be closely circumscribed, the Supreme Court focused mainly on protecting reputation interests and kept speech-based defenses relatively narrow. In 1984, the Court summarized this historical perspective in *Hepps v. Philadelphia Newspapers, Inc.*:[26]

> The underlying premise concerning the character of the defamed individual is the principle that any man accused of wrong-doing is presumed innocent until proven guilty. The decisions reasoned this principle transcended the criminal law and was equally applicable to the ordinary affairs of life. Based upon this premise we developed the rule that in actions for defamation, the general character or reputation of the plaintiff is presumed to be good. Since the gravamen of defamation is that the words uttered or written tend to harm the reputation, a consequence of the rule presuming the good reputation of the plaintiff was a presumption of the falsity of the defamatory words.[27]

Though the Court recognized that truth ("justification") was a complete defense,[28] it made clear that the mere fact that a defendant reasonably believed a statement to be true would not save him from liability.[29] Nor was proof of substantial truth sufficient. If the proof were to "extend not so broad as the allegation, or go beside it, or fall short of it, the defense will be held insufficient."[30] The burden of establishing that a statement was justified was placed squarely on the defendant as a matter of affirmative defense and, indeed, as late as 1971, the Court still authoritatively declared, "[A]lthough ordinarily in order to be actionable words must be false, falsity is not an element of a cause of action for libel in Pennsylvania."[31]

One area where the Court suggested a less restrictive attitude was its injection of the elusive concept of "malice" as a requirement for a defamatory statement to be actionable. An early leading case from 1806 is *M'Millan v. Birch*, which declared malice to be "an essential ingredient in slander."[32] Although the Court said malice would be implied, a defendant should be free to show that "there was no malice in my heart."[33] The Court held that the defendant's evidence that the speech at issue was made in a church presbytery while pleading a cause could rebut the presumption of malice and absolve him of liability. In *Sharff v. Commonwealth*,[34] the Court held that in a criminal prosecution for libel, malice had to be found by a jury.

Over time, however, the concept of "malice in my heart" blurred. Malice was implied, and little had to be shown to support the implication. As the Court explained in *Neeb v. Hope*, "Malice is said to be essential to an action for libel, but it is malice in a special and technical sense, which exists in the absence of lawful excuse, and where there may be no spite or ill will, or disposition to injure others. Every publication having the other qualities

of a libel, if wilful and unprivileged, is in law malicious."[35] In *Summit Hotel Co. v. National Broadcasting Co.*,[36] the Court refused to call the resulting regime one of strict liability, but its distinction was narrow: "[O]ur rule is not one of absolute liability, but rather, of a very strict standard of care to ascertain the truth of the published matter," in which "[t]he fact of defamatory publication is evidentiary of such lack of due care." Several decades later, the Court explicitly acknowledged that this was a strict-liability regime.[37]

One brighter spot in this tapestry was the Court's development of the law of privilege, an issue in which the Court did recognize the importance of freedom of expression. In *Case of Austin*,[38] the Court recognized the privilege of a lawyer to make statements critical of a judge, explaining, "[C]onduct of a judge, like that of every other functionary, is a legitimate subject of scrutiny, and where the public good is the aim, such scrutiny is as open to an attorney of his court as to any other citizen." The Court reached a similar result in *Ex parte Steinman*,[39] relying in part on an 1874 amendment to Section 7 of the Declaration of Rights providing that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury."

In *Briggs v. Garrett*,[40] the chair of a local civic committee read a letter by a city official that charged a judge seeking reelection with responsibility for a public works scandal. The Court held that there was a privilege to read the letter informing voters about the city official's charge because such an accusation against a candidate is "a matter for public information" and there was no "abuse" of free speech rights in disseminating it, even though the person reading the letter did not know whether the accusation was true: "If the voters may not speak, write or print anything but such facts as they can establish with judicial certainty, the right [of free speech] does not exist, unless in such form that a prudent man would be hesitant to exercise it."[41] Two years later, the Court held that this privilege to inform the public extended to press organizations.[42]

The theory of these cases ultimately evolved into a privilege of "fair report," under which a publisher could report defamatory information contained in government proceedings so long as the account was "fair, accurate and complete, and not published solely for the purpose of causing harm to the person defamed."[43] But the privilege was far from absolute. As the Court cautioned in *Conroy v. Pittsburgh Times*,[44] "The law, in cases of privilege, has been lenient to the claim, but it must not be allowed to become lax" and so must take care to reject such claims if a defendant could not prove the challenged statement to have been made on a proper occasion, from a proper motive, in a proper manner, and based on reasonable and proper cause.

III. THE POST-*SULLIVAN* ERA

In 1964, *New York Times Co. v. Sullivan* revolutionized defamation law by imposing new federal constitutional limitations on recovery as a means of securing greater "breathing space" for freedom of expression.[45] Suddenly there were new requirements for proof of fault by a plaintiff and new protections for a defendant who made innocent mistakes.[46] Similar protections might well have been grounded in the expansive language of Pennsylvania's constitutional protections for freedom of speech and press, but they were not. Indeed, in the face of the US Supreme Court's unveiling of a new era of solicitude for speech that previously might have been held actionable, the Pennsylvania Supreme Court showed little enthusiasm to join in. Rather than accepting the new federal decisions as a cue to engage in its own reinvigoration of state expression rights as they applied to defamation, the Court's decisions reflected a steadfast determination to protect the status quo or, at most, do no more than the federal courts held was required.

In *Corabi v. Curtis Pub. Co.*, for example, the Court engaged in an extensive review of defamation law to establish that the "constitutional privilege" established under *Sullivan* was fully consistent with traditional rules presuming that the defendant's statement was false and was conceded by the defendant to be false if the defendant failed to prove otherwise.[47] The Court also declined to interpret *Sullivan* to require proof of liability by clear and convincing evidence.[48] Each of these positions was later repudiated by the US Supreme Court.[49] In a decision difficult to square with *Sullivan* precepts, the Court upheld a verdict in favor of a murder suspect because, even though the article reported that she was not convicted, it also reported disputed facts that could suggest her guilt.[50]

In *Hepps*, the Court reiterated its view that Pennsylvania's traditional allocation to the defendant of the burden of proving truth was constitutionally justified. The Court reasoned that putting the burden of proof on the defendant met the constitutional floor set by *Sullivan* and its progeny because the plaintiff still had to show fault in the form of malice or negligence.[51] The US Supreme Court reversed, explaining that when the "scales are in such an uncertain balance" between putting the burden on the plaintiff or the defendant, "the Constitution requires us to tip them in favor of protecting true speech."[52]

As the US Supreme Court recognized greater protection of free expression, the Pennsylvania Supreme Court began to resist further advances, asserting a need to defend countervailing constitutional interests in reputation rights under the Pennsylvania Constitution. In *Hatchard v. Westinghouse Broadcasting Co.*,[53] the Court considered a Pennsylvania shield statute that it had construed in the 1960s to provide broad protections against compelled disclosure of reporters' sources.[54] The Court in *Hatchard* held that it needed to narrow that interpretation to protect only *confidential* sources because, under a broader interpretation, "serious questions would arise as to the constitutionality of the statute in light of the protection of fundamental rights [to reputation] provided for in the Pennsylvania Constitution."[55] As a result of the US Supreme Court's reversal in *Hepps*, some libel

plaintiffs now would have to prove both falsity and actual malice, and the Court explained that a statute shielding discovery of information relevant to those issues would make it "virtually impossible" for the plaintiff to prove his or her case and leave the defamed individual without a meaningful remedy.[56] One year later, in *Sprague v. Walter*,[57] the Court reiterated that any broad interpretation of the state shield law would infringe the state constitutional interest in reputation, which had "been placed in the same category with life, liberty and property."[58]

These decisions are difficult to reconcile with the Court's oft-stated pronouncements[59] that the protection of free expression in the Pennsylvania Constitution is broader than that in the federal First Amendment. The Court had embraced that special nature of free expression in Pennsylvania even when balancing it against the right to acquire, possess, and protect property under Article I, Section 1 of the Pennsylvania Constitution, which the Court called "one of 'the Hallmarks of Western Civilization.'"[60] But cases like *Hepps*, *Hatchard*, and *Sprague* signaled that when reputation (an interest recognized in the same clause of Article I, Section 1 as property) was at issue, the Court favored striking a different balance. It did so even though reputation had never been characterized as "fundamental" in the federal cases to which the Court often looked in making such determinations,[61] and the Court had never accorded all rights under Article I, Section 1 such "fundamental" status.[62]

The Court made its revised weighing of interests explicit in *Norton v. Glenn*.[63] At issue was whether the Court should recognize a privilege of the press to neutrally report defamatory statements made by public officials. The privilege had not yet been recognized by the US Supreme Court under the First Amendment, though a number of lower courts had done so. The plaintiff sought recognition of the privilege as either a matter of First Amendment law or a protection under Article I, Section 7 of the Pennsylvania Constitution. The Court rejected both arguments. In so doing, the Court held that federal protections of expression already had been extended very far, and it could not imagine that the US Supreme Court would "tilt" further by adopting a privilege to neutrally report a public official's defamation.[64] The Court then held that it could "not interpret our state constitution as providing even broader free expression rights than does its federal counterpart" because doing so would "infringe on the protection granted by the Pennsylvania Constitution to reputation."[65] Henceforth, the Court declared, "[T]he protections accorded . . . by the US Supreme Court to the right of free expression in defamation actions would demarcate the outer boundaries of our Commonwealth's free expression provision."[66] The Court's rhetoric about the special role of free expression in Pennsylvania constitutional law was thus shunted aside, and the state provision was demoted to no more than a First Amendment redundancy insofar as defamation law was concerned.

In *American Future Sys., Inc. v. Better Bus. Bureau*,[67] decided in 2007, the Court carried the demotion of Pennsylvania free-expression rights further, noting that *Norton* had construed the state Constitution to "highly prioritize reputational interests" and thereby preclude

any elevated role for interests of free expression.[68] At issue in the case was the notion of common-law privileges, which had been recognized as affording defenses to defamation for statements made in a proper manner or for a proper purpose, so long as a privilege was not "abused." Abuse of a privilege at common law could be shown by establishing that the defendant acted negligently, but under the new federal constitutional regime, all private-figure defamation plaintiffs had to prove negligence to recover.[69] Use of negligence as the standard to prove abuse of a privilege thus became superfluous if the plaintiff was a private figure. One solution would be to permit a defendant to maintain a privilege defense unless the plaintiff proved the privilege's abuse through conduct amounting to "actual malice"—a standard that was much higher than negligence and was inapplicable to defamation claims brought by private-figure plaintiffs. But the Court rejected that solution, stating, "[A]s a matter of common-law decisionmaking, Pennsylvania courts will not strengthen—for post-*Gertz* purposes—conditional privileges previously defined by reference to negligence principles so that, now, they may only be defeated by proving actual malice."[70] The Court also declined to require an actual malice standard if the speech at issue was about a matter of public concern.[71]

It is ironic that after the Supreme Court expressed a willingness to accord heightened protection to free expression under the Pennsylvania Constitution, it retreated from that position when it encountered such heightened protection actually being afforded under federal law. As a result, rather than recognizing free expression's primacy, the Court has afforded heightened protection to reputational interests, allowing them to trump advances in speech and press protections. Although these developments are disheartening to advocates of free expression, the Supreme Court has a long and venerable history, and there is still much time and opportunity to fine-tune this imbalance. Pennsylvania began its existence as a "flagship of free expression"; historians will watch to see whether it returns to that exalted role.

NOTES

Carl A. Solano authored this chapter when he was a partner at Schnader Harrison Segal & Lewis LLP. He later became a judge on the Superior Court of Pennsylvania. Edward J. Sholinsky is a partner at Schnader Harrison Segal & Lewis LLP.

1. 812 A.2d 591, 603 (Pa. 2002).
2. Ibid., 603.
3. Commonwealth v. Tate, 432 A.2d 1382, 1388 (Pa. 1981).
4. Frame of Government, "Laws Agreed Upon in England," § XXXV (1682).
5. *See* Proprietor v. Keith, Pa. Colonial Cas. 117 (Q.S. Phila. 1692) (S. W. Pennypacker, ed.); T. R. White, *Commentaries on the Constitution of Pennsylvania*, vol. 95 (Philadelphia: T. & J. W. Johnson, 1907) (calling this "the earliest case on record" where proof of truth was allowed).
6. *See* In re Mack, 126 A.2d 679, 683–84 (Pa. 1956) (separate opinion of Bell, J.), *cert. denied*, 352 U.S. 1002 (1957); Kane v. Commonwealth, 89 Pa. 522, 526–27 (1879).
7. Pa. Const. (1776) § 12.
8. S. F. Kreimer, "The Pennsylvania Constitution's Protection of Free Expression," *University of Pennsylvania Journal of Constitutional Law* 5 (October 2002): 12, 15.

9. *See* L. W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1960), 19–21.
10. 1 Dall. 319 (Pa. 1788).
11. Ibid., 325.
12. Ibid., 325–26.
13. Robert Levere Brunhouse, *The Counter-Revolution in Pennsylvania, 1776–1790* (Harrisburg: Pennsylvania Historical Commission, 1942), 225.
14. Pa. Const. art. IX, § 7 (1790) (now art. I, the Declaration of Rights).
15. Ibid., § 2.
16. *See* Respublica v. Cobbet, 3 Yeates 93, 101 (Pa. 1800) ("Libels are destructive both of public and private happiness, manifestly tend to breaches of the peace, and are good causes of forfeiture of a recognizance to keep the peace or of good behavior."); Respublica v. Passmore, 3 Yeates 441, 442 (Pa. 1802) ("If the minds of the public can be prejudiced by such improper publications, before a cause is heard, justice cannot be administered.").
17. 3 Yeates 518 (Pa. 1803).
18. Ibid., 519.
19. 1 Stat. 596.
20. "Alien and Sedition Acts: 1798," *NET Industries*, 2014, http://www.law.jrank.org/pages/2396/AlienSeditionActs.html.
21. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("the attack upon [the Sedition Act's] validity has carried the day in the court of history"); Tucker v. Philadelphia Daily News, 848 A.2d 113, 128–29 (Pa. 2004).
22. 4 Yeates 267 (Pa. 1805).
23. Ibid., 270, emphasis in original.
24. Ibid., 271.
25. *See* F. D. Rapone Jr., "Article I, Section 7 of the Pennsylvania Constitution and the Public Expression of Unpopular Ideas," *Temple Law Review* 74 (2001): 655, 667–79.
26. 485 A.2d 374 (Pa. 1984), *rev'd*, 475 U.S. 767 (1986).
27. Ibid., 378 (citations omitted).
28. *See, e.g.*, Steinman v. McWilliams, 6 Pa. 170 (1847).
29. Petrie v. Rose, 5 Watts & Serg. 364, 366 (Pa. 1843) ("[I]t is incompetent to a defendant in an action of slander to give evidence, in mitigation of damages, of facts and circumstances which induced him to suppose the charge true at the time it was made.").
30. Burford v. Wible, 32 Pa. 95, 96 (1858).
31. Corabi v. Curtis Pub. Co., 273 A.2d 899, 908 (Pa. 1971) (footnotes omitted).
32. 1 Binn. 178, 186 (Pa. 1806).
33. Ibid.
34. 2 Binn. 514 (Pa. 1810).
35. 2 A. 568, 570 (Pa. 1886).
36. 8 A.2d 302, 307 (Pa. 1939).
37. *See* American Future Sys., Inc. v. Better Bus. Bureau, 923 A.2d 389, 396 (Pa. 2007).
38. 5 Rawle 191, 205 (Pa. 1835).
39. 95 Pa. 220, 237 (1880).
40. 2 A. 513 (Pa. 1886).
41. Ibid., 523.
42. Press Co. v. Stewart, 14 A. 51, 53 (Pa. 1888).
43. *See* Sciandra v. Lynett, 187 A.2d 586, 588–89 (Pa. 1963).
44. 21 A. 154, 156 (Pa. 1891).
45. *See* 376 U.S. at 271–72.
46. *See, e.g.*, ibid.; Garrison v. La., 379 U.S. 64 (1964); St. Amant v. Thompson, 390 U.S. 727 (1968); and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
47. 273 A.2d at 907–11.
48. Ibid., 911–12.
49. *See* Phila. Newspapers v. Hepps, 475 U.S. 767 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).
50. 273 A.2d at 915–18.
51. 485 A.2d 374, 385–86 (Pa. 1984).
52. 475 U.S. 776–77 (1986).
53. 532 A.2d 346, 350 (Pa. 1987).
54. *See* In re Taylor, 193 A.2d 181, 185 (Pa. 1963) (basing decision on the need of newsmen to be "able to *fully and completely* protect the sources of their information" and how it was "vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion"), emphasis in original.
55. 532 A.2d at 350–51.
56. Ibid., 349–51.
57. 543 A.2d 1078, 1084–85 (Pa. 1987).
58. *See also* Commonwealth v. Bowden, 838 A.2d 740 (Pa. 2003) (refusing to apply shield law to reporters' notes sought for a criminal proceeding); Castellani v. Scranton Times, L.P., 956 A.2d 937, 949–50 (Pa. 2008) (describing these decisions as limiting the shield law to its "core protections" of protecting confidential sources).
59. *See, e.g.*, DePaul v. Commonwealth, 969 A.2d 536, 546–47 (Pa. 2009); Pap's, 812 A.2d at 603; Ins. Adj. Bur. v. Ins. Comm'r., 542 A.2d 1317, 1324 (Pa. 1988); Tate, 432 A.2d at 1387–90; William Goldman Theatres, Inc. v. Dana, 173 A.2d 59, 61–62 (Pa. 1961), *cert. denied*, 368 U.S. 897 (1961).

60. Tate, 432 A.2d 1388–89.
61. *See* Paul v. Davis, 424 U.S. 693, 701–2 (1976).
62. *See* Nixon v. Commonwealth, Dep't of Publ. Welfare, 839 A.2d 277, 286–88 (Pa. 2003) (citing federal and state cases).
63. 860 A.2d 48 (Pa. 2004).
64. Ibid., 56–57.
65. Ibid., 57–59.
66. Ibid., 58; accord, Joseph v. Scranton Times, 129 A.3d 404, 428 (Pa. 2015).
67. 923 A.2d at 398.
68. *See also* ibid., 395 ("[R]eputational interests occupy an elevated position within our state Constitution's system of safeguards, and hence, in the context of defamation law the state Constitution's free speech guarantees are no more extensive than those of the First Amendment.").
69. *See* Gertz, 418 U.S. at 347.
70. 923 A.2d at 398.
71. Ibid., 398–400.

STILL LIVING AFTER FIFTY YEARS: A CENSUS OF JUDICIAL REVIEW UNDER THE PENNSYLVANIA CONSTITUTION OF 1968

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INTRODUCTION

The year 2018 marked the fiftieth anniversary of the Pennsylvania Constitution of 1968.[1] The year dramatized the contrast between the United States Supreme Court's continued reluctance to engage with the problem of partisan gerrymandering and the Pennsylvania Supreme Court's deployment of its independent authority under the Pennsylvania Constitution to dispatch the flamboyantly gerrymandered map of Pennsylvania's congressional districts.[2] It occasioned the first time that members of the Pennsylvania Legislature moved for the wholesale impeachment of a majority of the Pennsylvania Supreme Court over the exercise of its power of judicial review under the state constitution.[3]

1. The Pennsylvania Constitution "as amended by referenda of May 17, 1966, November 8, 1966, May 16, 1967 and April 23, 1968 and as numbered by proclamation of the Governor . . . shall be known and may be cited as the 'Constitution of 1968.'" 1 PA. CONS. STAT. § 906(b) (1972).

2. *Compare* Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018) (denying relief in Wisconsin for allegedly unconstitutional partisan gerrymandering on grounds of standing), *and* Benisek v. Lamone, 138 S. Ct. 1942, 1943–44 (2018) (per curiam) (denying relief in Maryland on equitable grounds), *with* League of Women Voters of Pa. v. Commonwealth, 175 A.3d 282, 284 (Pa. 2018) (per curiam) (order announcing forthcoming opinion of the Pennsylvania Supreme Court), League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 741 (Pa. 2018) (invalidating 2011 congressional map for violating the state constitution), *and* League of Women Voters of Pa. v. Commonwealth, 181 A.3d 1083, 1087 (Pa. 2018) (per curiam) (adopting reapportionment plan). The United States Supreme Court has rejected attempts to reverse these decisions. *See* Turzai v. League of Women Voters of Pa., 138 S. Ct. 1323 (2018) (mem.).

For an image of the florid nature of Pennsylvania's gerrymander, see, e.g., Aaron Blake, *Name that District Contest Winner: 'Goofy Kicking Donald Duck,'* WASH. POST (Dec. 29, 2011), https://www.washingtonpost.com/blogs/the-fix/post/name-that-district-contest-winner-goofy-kicking-donald-duck/2011/12/29/gIQA2Fa2OP_blog.html; *see also League of Women Voters of Pa.*, 181 A.3d at 1110 (containing images of districts); *League of Women Voters of Pa.*, 178 A.3d at 750 (same).

3. *See* Memorandum from Cris Dush, Representative, Pa. House of Representatives, to Members of the Pa. House of Representatives (Feb. 5, 2018), http://www.legis.state.pa.us//cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=201%2070&cosponId=25163; Katie Meyer, *Pennsylvania Chief Justice Criticizes Impeachment Moves*, NPR (Mar. 22, 2018, 5:58 PM),

The year 2018 saw, as well, the retirement of Justice Anthony Kennedy and the appointment of Justice Brett Kavanaugh, portending a shift in the trajectory of the constitutional sensibility of the working majority of the United States Supreme Court. The inflection of federal constitutional law that accompanied the appointments of Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell, William Rehnquist, and John Paul Stevens between 1969 and 1975 generated a surge of interest in independent state constitutional protection of individual rights abandoned or slighted in federal jurisprudence that became known as the "New Judicial Federalism."[4] We can expect

https://www.npr.org/2018/03/22/596172829/pennsylvania-chief-justice-criticizes-impeachment-moves; Mark Scolforo, *GOP Plan to Impeach 4 Pennsylvania Justices Remains in Limbo*, WESA (Apr. 22, 2018), http://www.wesa.fm/post/gop-plan-impeach-4-pennsylvania-justices-remains-limbo#stream/0. The Pennsylvania Supreme Court consists of seven justices. PA. CONST. art. V, § 2.

There was one precursor. In 1805, Pennsylvania's Republican legislators tried to impeach and convict three Federalist Justices—Shippen, Yeates, and Smith—who served on the four-member Pennsylvania Supreme Court. The precipitating claims regarded their treatment of a litigant in a non-constitutional case. The impeachment failed to achieve the requisite two-third majority. *See* Elizabeth K. Henderson, *The Attack on the Judiciary in Pennsylvania, 1800–1810*, 61 PA. MAG. OF HIST. & BIOGRAPHY 113, 113–14 (1937); RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 165–70 (1971). Justice Yeates referenced the possibility of impeachment three years later in *Emerick v. Harris*:

> Every one can readily see that the judges may be thrown into a delicate situation by the exercise of this constitutional right [to judicial review]. They are subjected to the lawmaking power by impeachment . . . . [T]he constitution of this state contemplates no wilful perversion of the power of impeachment or removal; and it is to be hoped, for the honour of human nature, that such instances will seldom occur. Whenever it does happen, the judge must derive consolation from the integrity of his own mind, and the honest feelings that he has discharged his duty with fidelity to the government. When he accepted his commission he knew the tenure of his office; and it is much better that individuals should suffer a private inconvenience, than the community sustain a public injury. Posterity sooner or later will do him complete justice.

1 Binn. 416, 421 (Pa. 1808).

4. The fountainhead of the movement was Justice Brennan's call for independent state constitutional adjudication in William J. Brennan, Jr., *State Constitutions and the Protection of Individual Right*s, 90 HARV. L. REV. 489, 502 (1977) ("[T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. . . . [S]tate court judges and the members of the bar seriously err if they so treat them."). *See also* Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1235–44 (1977); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1112 (1997). For a recent thoughtful overview and appreciation of the New Judicial Federalism from the California bench, see Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312–13 (2017), and from the Pennsylvania bench, see Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial*

renewed interest in independent state constitutional interpretation in the coming decade.

The time seems ripe, therefore, to explore the Pennsylvania Supreme Court's exercise of judicial review under the 1968 Pennsylvania Constitution. This Article constitutes—so far as I can determine—the first such comprehensive exploration.[5]

This Article begins with an historical overview of the evolution of the Pennsylvania Constitution, culminating in the Constitution of 1968, and of Pennsylvania's practice of independent judicial review. It then presents a census of the cases in which the Pennsylvania Supreme Court has deployed independent state constitutional review under the Constitution of 1968. The core of the census was a review of the 1586 reported Pennsylvania Supreme Court cases in the fifty years since the adoption of the 1968 Constitution referring to claims of unconstitutionality under the Pennsylvania Constitution.[6] This Article analyzes the 373 identified cases in which the supreme court has vindicated distinctive Pennsylvania constitutional rights.[7]

Federalism and the Acknowledged, Prophylactic Rule, 59 N.Y.U. ANN. SURV. AM. L. 283, 289–91 (2003). *See also* Commonwealth v. Edmunds, 586 A.2d 887, 895 n.6 (Pa. 1991) ("The term 'New Federalism' has been used increasingly to define the recent emphasis on independent state constitutional analysis.").

5. The collections of essays edited by Ken Gormley and John Hare provide valuable resources. THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES (Ken Gormley et al. eds., 2004); THE SUPREME COURT OF PENNSYLVANIA: LIFE AND LAW IN THE COMMONWEALTH, 1684–2017 (John J. Hare ed., 2018). The important collection of materials at the Pennsylvania Constitution webpage, see PA CONSTITUTION: DUQ. U. SCH. L., https://www.paconstitution.org (last visited Nov. 1, 2018) (follow "Periodical Summaries" hyperlink), the constellation of articles on specific provisions of the Pennsylvania Constitution, and the galaxy of commentary on the New Judicial Federalism also provide valuable resources. Readers interested in exploring this galaxy are encouraged to input "New Judicial Federalism" or "Brennan, State Constitutions and the Protection of Individual Rights" (or "Robert F. Williams" and "state constitution") into their favorite research engine.

But no author has undertaken a comprehensive census of the Pennsylvania Supreme Court's work of independent constitutional review under the 1968 Constitution.

6. Lexis searches of [("Pennsylvania constitution" or "constitution of Pennsylvania" or "state constitution") and ("unconstitutional" or violat!)] in the Pennsylvania Supreme Court file covering cases decided between the adoption of the 1968 Pennsylvania Constitution yielded 1586 cases. This sample was supplemented by Shepardizing those cases in which judicial review invalidated or limited government actions. For details, see *infra* App. A.

7. It does not analyze cases in which the court concluded that the action under review was wholly consistent with the Pennsylvania Constitution; nor does it analyze the set of cases in which the superior court or commonwealth court has engaged in independent state constitutional review, but the supreme court has not expressly evaluated that determination.

As to the first limitation, while the "ratifying function" of judicial review can be important, it does not generate either the independent analysis or the degree of controversy

The first contribution of the project is descriptive, undertaken in the spirit of the young Oliver Wendell Holmes, Jr. He wrote:

> History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. . . . When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.[8]

To begin the process of taming the dragon, Appendix C sets forth the census of cases in a form that provides lawyers, judges, and scholars with a resource that can be deployed in research, advocacy, and analysis.[9] The Article proceeds to analyze those cases and place their exercises of judicial review into historical context. It concludes with reflections on the nature of the Pennsylvania Supreme Court's judicial review under the Constitution of 1968. The Pennsylvania Constitution is not, as the late Justice Scalia would have it, "dead, dead, dead."[10] The Pennsylvania Supreme Court has engaged in a continuing process of judicial statesmanship that looks to text, history, structure, and ongoing doctrinal elaboration to bring evolving constitutional traditions and values to bear on the issues confronting the Commonwealth. The process has not always been unanimous, or without contention. But it is precisely what the people of the Commonwealth had reason to expect when they adopted the amendments that constitute the 1968 Constitution.

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accompanying the invalidation or modification of the work of other branches of government. As to the second, while these cases are often consequential, e.g., Mixon v. Commonwealth, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000), *aff'd*, 783 A.2d 763 (Pa. 2001) (striking down disenfranchisement of ex-offenders); Peake v. Commonwealth, 132 A.3d 506, 521 (Pa. Commw. Ct. 2015) (invalidating lifetime employment disqualification of ex-offenders), life is short, and this Article is already long.

By way of full disclosure, readers should be aware that I was part of the counsel team that litigated *Peake* and its predecessor, *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003). I was also part of the plaintiffs' counsel team in *Fischer v. Department of Public Welfare*, 502 A.2d 114 (Pa. 1985), and wrote amicus briefs in support of the plaintiffs in *William Penn School District v. Pennsylvania Department of Education*, 170 A.3d 414 (Pa. 2017), *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002), and *Hartford Accident & Indemnity Co. v. Insurance Comm'r of Commonwealth*, 482 A.2d 542 (Pa. 1984).

8. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).

9. An earlier ten-year version of Appendix C was presented to a conference commemorating the fiftieth anniversary of the Pennsylvania Constitution, sponsored by the Pennsylvania Commission on Judicial Independence on March 18, 2018. It proved welcome among the judges and attorneys attending the conference.

10. *See* Saikrishna Bangalore Prakash, *A Fool for the Original Constitution,* 130 HARV. L. REV. F. 24, 27 (2015) (quoting Justice Scalia's characterization of the U.S. Constitution).

I. THE EVOLUTION OF THE PENNSYLVANIA CONSTITUTION AND OF PENNSYLVANIA JUDICIAL REVIEW

Between 1701 and 1776, Pennsylvania's pre-Revolutionary governments functioned under a series of Frames of Government, and a Charter of Privileges established by William Penn as Proprietor and his successors. The first independent and popular Pennsylvania Constitution was promulgated in July 1776 by an extralegal constitutional convention, elected in the shadow of the American Declaration of Independence by an electorate of 6,000, from which both loyalists and Quakers were excluded.[11] The 1776 Constitution enacted a Declaration of Rights, which included the lineal predecessors of much of the current Declaration of Rights.[12] Judges of the supreme court were appointed for seven-year terms by a popularly elected executive council,[13] and an elected Council of Censors was responsible for determining "whether the constitution has been preserved inviolate," recommending repeal of unconstitutional statutes and convening subsequent Conventions by a two-thirds vote.[14]

In 1789, the Council of Censors received a petition from eighteen thousand persons seeking adoption of a new constitution. When the Censors failed to achieve the two-thirds majority required by the existing constitution for amendment, a majority of the Pennsylvania Assembly issued an extralegal call for a constitutional convention.[15] Delegates were popularly elected pursuant to that call, and in September of 1790, the convention proclaimed a new constitution without popular ratification.[16] The 1790 Constitution retained much of the Declaration of Rights of the 1776 Constitution.[17] It added the declaration "[t]hat elections shall be

11. *See* ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 12–13 (1960).

12. PA. CONST. of 1776, art. I; PA. CONST. of 1968, art. I.

13. PA. CONST. of 1776, art. II, § 19 (executive council elected, president chosen by council and general assembly); *id.* art. II, § 20 (appointment of judges by president and council); *id.* art. II, § 23 (seven-year terms for judges); *id.* art. II, § 24 (judges have powers "usually exercised by such courts").

14. *Id.* art. II, § 47 (Censors "shall be to enquire whether the constitution has been preserved inviolate in every part . . . . [T]hey shall have authority to pass public censures, to order impeachments and to recommend to the legislature the repealing such laws as appear to them to have been enacted contrary to the principles of the constitution."); *id.* (establishing a two-third quorum requirement to call for Convention).

15. BRANNING, *supra* note 11, at 18–19.

16. *Id.* at 19–20.

17. *Compare* PA. CONST. of 1776, art. I, *with* PA. CONST. of 1790, art. IX. The Declaration of Rights was placed at the conclusion of the document as Article IX, where the "inherent rights" provision (article I, section I of the 1776 Constitution) eliminated reference to "natural" and "inalienable" rights and replaced it with a declaration of

free and equal" and prohibited infliction of "cruel punishments"[18] It abolished the Council of Censor and provided for lifetime gubernatorial appointment of judges and justices to serve on good behavior, but it did not otherwise address issues of constitutional enforcement.[19]

Justices appointed under the 1790 Constitution asserted power to declare legislation inconsistent with the Pennsylvania Constitution and hence void well before Justice Marshall exercised authority under the Federal Constitution in *Marbury v. Madison* in 1803.[20] In 1808, having survived an impeachment effort, Justice Yeates declaimed, "until lately there was but one opinion on this subject; it being uniformly conceded by the bar, and held by the bench, that the courts of justice must necessarily possess and exercise the power of judging of the constitutionality of all laws, brought before them judicially."[21]

In 1825 Chief Justice William Tilghman wrote for a majority in *Eakin v. Raub*, that "when a judge is convinced, beyond doubt, that an act has been passed in violation of the constitution, he is bound to declare it void."[22] By contrast, Justice John Bannister Gibson's dissent in *Eakin* argued at length that judicial review of legislative determinations under the Pennsylvania Constitution was an improper usurpation of the authority of the people of Pennsylvania.[23]

"indefeasible" rights that recognized a right to "protecting . . . reputation" and eliminated reference to a right of "pursuing and obtaining . . . safety." PA. CONST. of 1776, art. I, § 1; PA. CONST. of 1790, art. IX, § 1.

18. PA. CONST. of 1790, art. IX, § 5 (free and equal elections); *id.* art. IX, § 13 (cruel punishments).

19. *Id.* art. II, § 8 (appointment); *id.* art. V, § 2 (good behavior).

20. *Compare* Marbury v. Madison, 5 U.S. 137, 177 (1803), *with* Austin v. Trs. of Univ. of Pa., 1 Yeates 260, 261 (Pa. 1793) ("The plaintiff's claim then must be *chiefly* founded on the act of the 6th *August* 1784, which it is said vested the real estate of his brother in him. But the act was repealed . . . and I have no difficulty in declaring for the same reasons, that the former act was *unconstitutional*."), *and* Hubley's Lessee v. White, 2 Yeates 133, 147 (Pa. 1796) (dictum) (per curiam) ("We possess also the power of declaring a law to be unconstitutional, and such power has heretofore been exercised. . . . [A] *very clear* case only can warrant it."), *and* Respublica v. Duquet, 2 Yeates 493, 501 (Pa. 1799) (dictum) ("As to the constitutionality of these laws, a breach of the constitution by the legislature, and the clashing of the law with the constitution, must be evident indeed, before we should think ourselves at liberty to declare a law void and a nullity on that account.").

21. Emerick v. Harris, 1 Binn. 416, 422–23 (Pa. 1808).

22. Eakin v. Raub, 12 Serg. & Rawle 330, 339 (Pa. 1825) (Tilghman, C.J.); *accord id.* at 381 (Duncan, J.) ("Under this view of the judicial department, it is surely the best, the safest, and in our republic, can be the only mediation between a citizen and an unconstitutional act of the legislature.").

23. *Id.* at 355 (Gibson, J., dissenting) ("I am of opinion, that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act. What is wanting to plenary power in the government, is reserved by the people, for their own immediate use; and to redress an infringement of their rights in this respect . . . .").

After an unsuccessful legislative call for a constitutional convention in 1825 and a decade of popular dissatisfaction with the 1790 Constitution, in 1835, the Pennsylvania Legislature passed a statute submitting a call for a constitutional convention to a popular referendum.[24] Upon approval by the voters, the Legislature provided for popular election of convention delegates, and the delegates framed a revised constitution, which retained the Declaration of Rights from the 1790 Constitution.[25] The convention debated objections to judicial review but rejected calls for popular election of judges. The compromise adopted limited the terms of the supreme court justices to fifteen years.[26] In 1838, the electorate of Pennsylvania ratified the new constitution by a closely divided vote.[27] This was the first electoral ratification of a Pennsylvania constitution.[28]

In the aftermath of the 1837 constitutional debate over judicial review and elections, and the compromise reached and ratified in 1838, Justice Gibson—who had become Chief Justice in 1827—receded from his prior skepticism regarding judicial review. He viewed the new constitution as an acquiescence by the People in the exercise of judicial review and adopted as his own the concern that constitutional rights would otherwise be insecure.[29]

24. *See generally* BRANNING, *supra* note 11, at 22; John L. Gedid, *Pennsylvania Constitutional Conventions—Discarding the Myths*, 82 PA. B. ASS'N Q. 151, 157 (2011).

25. *See* Gedid, *supra* note 24, at 156.

26. BRANNING, *supra* note 11, at 24–25, 30; *see* Harry L. Witte, *Judicial Selection in the People's Democratic Republic of Pennsylvania: Here the People Rule?*, 68 TEMP. L. REV. 1079, 1106–11 (1995) (discussing debates over judicial selection and judicial review).

27. BRANNING, *supra* note 11, at 31.

28. *See generally* Gedid, *supra* note 24, at 157–59 (discussing the 1837 convention's adoption of procedures for calling future constitutional conventions and for electoral ratification of future amendments).

29. *See, e.g.*, Menges v. Wertman, 1 Pa. 218, 222 (1845) (Gibson, C.J.) ("My theory, however, seems to have been tacitly disavowed by the late convention, which took no action on the subject, though the power had notoriously been claimed and exerted. But experience has taught me the futility of mere theory. There must be some independent organ to arrest unconstitutional legislation, or the citizen must hold his property at the will of an uncontrollable power. It would be useless for the people to impose restrictions on legislation, if the acts of their agents were not subject to revision."); *see* Norris v. Clymer, 2 Pa. 277, 281 (1845) (in the course of argument, Chief Justice Gibson observed: "I have changed that opinion for two reasons. The late Convention, by their silence, sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and from experience of the necessity of the case."); Norman v. Heist, 5 Watts & Serg. 171, 173 (Pa. 1843) (Gibson, C.J.) (addressing statute retroactively allowing inheritance by illegitimate offspring: "We dare not say that more was intended, and by that accuse the Legislature of an attempt to break their promise in the presence of Almighty God, to support the Constitution, which declares that no citizen shall be deprived of his life, liberty or *property*, unless by the judgment of his peers or the law of the land. . . . The design of the convention was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it, if such

In 1850, the Pennsylvania Constitution was amended to provide for popular election of judges.[30] During the ensuing generation, Justice Gibson[31] and his colleagues continued to wield state constitutional authority to invalidate an array of legislation that they determined to be tyrannical interferences with vested rights.[32]

In the decades following the Civil War, industrial development, urbanization, political corruption, and the rise of corporate manipulation

rescripts or decrees were allowed to take effect in the form of a statute. The right of property has no foundation or security but the law; and when the Legislature shall successfully attempt to overturn it, even in a single instance, the liberty of the citizen will be no more."); *see also* Brown v. Hummel, 6 Pa. 86, 89–91 (1847) (Coulter, J.) ("The act of 1846 makes important alterations in the will of the testator. . . . The bill of rights, which is for ever excluded from legislative invasion, declares that the trial by jury shall remain as heretofore, and the right thereof be inviolate; that all courts shall be open, and that every man shall have redress by the due course of law, and that no man can be deprived of his right, except by the judgment of his peers or the law of the land. . . . [T]he talismanic words, *I am a citizen of Pennsylvania*, secures to the individual his private rights, unless they are taken from him by a trial . . . according to the laws and customs of our fathers, and the securities and safeguards of the constitution.").

30. BRANNING, *supra* note 11, at 31–32; Witte, *supra* note 26, at 1112.

31. After the change to popular election of the judiciary, Chief Justice Gibson was the only sitting justice elected to stay on the bench. However, he no longer served as Chief Justice, and was replaced by Chief Justice Jeremiah S. Black in 1851. Thaddeus Stevens, Address and Jeremiah S. Black, Chief Justice, Eulogy (May 9, 1853), *reprinted in* THOMAS P. ROBERTS, MEMOIRS OF JOHN BANNISTER GIBSON, LATE CHIEF JUSTICE OF PENNSYLVANIA 102, 106 (1890).

32. *See, e.g.*, *In re* Wash. Ave., 69 Pa. 352, 363 (1871) (invalidating paving assessment, holding: "There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions, that covers it with an ægis of protection against all unjust, unreasonable and palpably unequal exactions under any name or pretext."); Craig v. Kline, 65 Pa. 399, 413–14 (1870) (determining that log owners were entitled to notice and an opportunity to show that they did not set the logs afloat contrary to law); Reiser v. William Tell Sav. Fund Ass'n, 39 Pa. 137, 144–46 (1861) (declaring retroactive removal of usury prohibition unconstitutional); Menges v. Dentler, 33 Pa. 495, 495 (1859) (holding that an act declaring a sheriff's sale of mortgaged property as valid was unconstitutional); McCabe v. Emerson, 18 Pa. 111, 112 (1851) (invalidating legislative interference with plaintiff's $400 judgment as unconstitutional); De Chastellux v. Fairchild, 15 Pa. 18, 20 (1850) ("It is idle to say the authority of each branch is defined and limited in the constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that it is thoughtlessly but habitually violated; and the sacrifice of individual right is too remotely connected with the objects and contests of the masses to attract their attention."); *cf.* Commonwealth *ex rel.* Roney v. Warwick, 172 Pa. 140, 143–44 (1895) (citations omitted) ("It was unavoidable, in their earlier administration, that conflict should have arisen between the legislative and judicial branches of our government. The form of government was new, and the exact limitations of duty and power were imperfectly understood. . . . [T]he feeble resistance offered by the judiciary naturally encouraged encroachments by the legislature. The mischief which resulted became so great that this court was compelled to take a stand in assertion of the power which the constitution had conferred.").

generated an array of legislative and political abuses that precipitated calls for another constitutional convention.[33] In 1871, the Pennsylvania Legislature authorized a referendum on a constitutional convention, which prevailed by a margin of greater than four to one.[34] The enabling legislation in 1872 decreed that delegates to the convention were to be elected by a combination of elections by senatorial districts, elections by

33. *See* Gedid, *supra* note 24, at 159–60; Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 810–11 (1987) [hereinafter Williams, *State Constitutional Limits on Legislative Procedure*] ("Legislative abuses led to the specific limitations on legislative procedure inserted into the Pennsylvania Constitution in 1874."); *see also* Washington v. Dep't of Pub. Welfare of Pa., 188 A.3d 1135, 1145 (Pa. 2018) ("By the time of the Civil War, large corporations, particularly the railroads, and other wealthy special interest groups and individuals had acquired such influence over the General Assembly that they routinely secured the passage of legislation which exclusively served their narrow interests to the detriment of the public good. As a result, during the decade after that conflict ended, the populace became increasingly dissatisfied with the manner in which the General Assembly was functioning, such that the people lost confidence in the legislature's ability to fulfill its most paramount constitutional duty of representing their interests." (citation omitted)); Nextel Commc'ns of the Mid-Atlantic, Inc. v. Commonwealth, 171 A.3d 682, 694 (Pa. 2017) ("[A] larger package of constitutional provisions the people of the Commonwealth approved in adopting the 'Reform Constitution' of 1874 for the purpose of altering certain legislative practices which had become commonplace during the 19th century, but which, by the latter part of that century, had fallen into serious disfavor with the populace, who rightly perceived that these practices were intended to advance private or personal interests at the expense of the public's welfare."); William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 423 n.13 (Pa. 2017) ("This Court previously has observed that the 1874 Constitution 'was drafted in an atmosphere of extreme distrust of the legislative body and of fear of the growing power of corporations,' and reflected a 'prevailing mood . . . of reform.'" (alteration in original)); Mount Airy #1, LLC v. Pa. Dep't of Revenue, 154 A.3d 268, 273 (Pa. 2016) ("This Court long has recognized that the Constitution of 1874 sought 'to correct the evil of unwise, improvident and corrupt legislation which had become rampant at the time of its passage.'"(quoting Consumer Party of Pa. v. Commonwealth, 507 A.2d 323, 333 (Pa. 1986))); Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 394 (Pa. 2005); *In re* Commonwealth, Dep't of Transp., 515 A.2d 899, 901 (Pa. 1986) (quoting BRANNING, *supra* note 11, at 37); *accord* Stilp v. Hafer, 718 A.2d 290, 295 (Pa. 1998) ("[O]vershadowing all else, reform of legislation [was] to eliminate the evil practices that had crept into the legislative process. Legislative reform was truly the dominant motif of the convention and that purpose is woven into the very fabric of the constitution." (quoting BRANNING, *supra* note 11, at 56)).

Proponents concluded that constitutional amendments in 1864 restricting bills to a single subject and requiring identification of the purpose of a bill in its title had not sufficiently addressed opportunities for corruption. *See* BRANNING, *supra* note 11, at 32.

34. *See* Gedid, *supra* note 24, at 160 n.66 (332,119 in favor to 62,738 against). Branning says 328,000 to 70,000. BRANNING, *supra* note 11, at 56. For the most valuable and thorough exploration of the historical sources regarding the pathologies that precipitated the 1874 Constitution that I have found in the legal literature, see Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 185–94 (1993), which includes the striking statistic that in the seven years preceding the 1873 constitutional convention, the Pennsylvania Legislature adopted 475 general laws and 8755 special or private laws. *See id.* at 187 n.124.

counties, and large elections that preserved representation for minorities in each constituency.[35]

The convention was not authorized by its enabling legislation to "alter in any manner" the Declaration of Rights, though ultimately the convention marginally strengthened several of its provisions.[36] The delegates debated and rejected the substitution of appointive for elective judges but increased the term of service for supreme court judges from fifteen to twenty-one years.[37]

The convention generated substantial revisions to the rest of the governmental structure that were "decisively" ratified by popular vote in December of 1873 and became effective January 1, 1874.[38]

The new constitution lengthened the term of the governor, strengthened the governor's veto authority by providing a line item veto over appropriation bills, and established the office of lieutenant governor and an independent Superintendent of Common Schools.[39] It also reformed municipal governance, required cumulative voting in corporate elections, required railroads to act as common carriers, and imposed barriers to corporate collusion.[40] Further, the new constitution established a legislative duty to "provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose."[41]

But the bulk of the new provisions were prohibitive. By one count, the new constitution added more than sixty "thou shalt nots" in one

35. *See* BRANNING, *supra* note 11, at 56–57; *cf.* Appeal of Woods, 75 Pa. 59, 66–67 (1874) (rejecting a challenge to this method of choosing delegates as inconsistent with "free and equal" elections).

36. 1872 Pa. Laws 53, 55; *see* Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 463 n.322 (1993) ("[The convention] added the prohibition on civil or military interference with the right of suffrage, PA. CONST. of 1874, art. I, § 5; somewhat strengthened the protection of the press, *id.* § 7; required that the 'just compensation' for private property taken for public use be 'made or secured' *prior* to the taking, *id.* § 10; and prohibited the legislature from 'making irrevocable any grant of special privileges or immunities,' *id.* § 17.").

37. PA. CONST. of 1874, art. V, § 2; *see* BRANNING, *supra* note 11, at 82–84.

38. *See* BRANNING, *supra* note 11, at 122 n.49 (reporting that the constitution was adopted by a vote of 253,560 to 109,198); ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 577–78 (1985).

39. PA. CONST. of 1874, art. IV, §§ 1, 3, 15, 20.

40. *Id.* art. XV; *id.* art. XVI, §§ 2, 4; *id.* art. XVII, § 1.

41. *Id.* art. X, § 1.

legislative article alone.[42] Among other limits, the 1874 Constitution prominently originated the constitutional prohibitions on "special legislation" in twenty-six specified areas,[43] and the requirement that "taxes shall be uniform."[44]

The 1874 prohibitions laid the groundwork for decades of judicial review.[45] Looking back from the turn of the century, Justice Mitchell observed:

> The constitution of 1873 was a new departure in the history of the law. Instead of being confined, in accordance with the traditions of American institutions, to the framework of the government as composed of general and fundamental principles, it was converted into a binding code of particulars and details, which had previously been left to the province of ordinary legislation. And the ruling motive with which we are now specially concerned was profound distrust of the legislature. As pointed out by our Brother Dean in *Perkins v. City of*

42. *See* Perkins v. City of Philadelphia, 27 A. 356, 360 (Pa. 1893) ("Article 3 is almost wholly prohibitory. It enjoins very few duties, but the 'thou shalt nots' number more than 60 . . . .").

This profusion of prohibitions was on occasion cited to suggest a limit on judicial review. *See, e.g.*, Commonwealth *ex rel.* Elkin v. Moir, 49 A. 351, 352, 359 (Pa. 1901) ("The fact that the action of the state towards its municipal agents may be unwise, unjust, oppressive, or violative of the natural or political rights of their citizens is not one which can be made the basis of action by the judiciary. . . . [The constitutional detail is] incontrovertible evidence that the constitution is the result of a full, detailed, exhaustive consideration of the subject of legislative control over merely local affairs is of itself a conclusive argument against any further additions by the courts to its 60 and more expressed prohibitions. There is no sounder or better settled maxim in the law than, 'Expressio unius, exclusion est alterius.'").

43. PA. CONST. of 1874, art. III, § 7, *amended by* PA. CONST. of 1968, art. III, § 32. The provision also prohibited enactment of "special or local law by the partial repeal of a general law" or "any law . . . granting powers or privileges in any case where the granting of such powers and privileges shall have been provided for by the general law." *Id.*

44. PA. CONST. of 1874, art. IX, § 1, *amended by* PA. CONST. of 1968, art. VIII, § 1.

45. *See, e.g.*, Appeal of Ayars, 16 A. 356, 364 (Pa. 1889) ("It has also been suggested that the question of necessity for classification, and the extent thereof, as well as of what are local or special laws, is a legislative, and not a judicial, question. The answer to that is obvious. The people, in their wisdom, have seen fit, not only to prescribe the form of enacting laws, but also, as to certain subjects, the method of legislation, by ordaining that no local or special law relating to those subjects shall be passed. Whether, in any given case, the legislature has transcended its power, and passed a law in conflict with that limitation, is essentially a question of law, and must necessarily be decided by the courts. To warrant a conclusion that the people, in ordaining such limitations, intended to invest their law-makers with judicial power, and thus make them final arbiters of the validity of their own acts, would require the clearest and most emphatic language to that effect. No such intention is expressed in the constitution, and none can be inferred from any of its provisions.").

> *Philadelphia*, article 3 contains 60 specific prohibitions of legislation, besides other restrictions and regulations not absolutely prohibitory. Through these the pathway for honest and desirable and necessary laws even yet is not always clear, and it was inevitable that there should be some uncertainty and even divergence in the views of judges thus forced to enter on an untrodden and difficult field.[46]

These limits chafed,[47] but over the next eight decades, efforts to revisit the Constitution of 1874 comprehensively proved unsuccessful.[48] A referendum seeking to hold a constitutional convention was approved by the legislature but rejected by the electorate in 1891. The failure of efforts to reform the constitution by convention repeated itself five more times in the next seventy years, though particular provisions of the constitution were amended more than seventy times.[49]

Ultimately, a comprehensive revision was achieved over the period between 1963 and 1968 by seriatim constitutional amendments legislatively proposed and electorally ratified in 1966 and 1967, followed by a convention approved by referendum in 1967, with the convention's revisions electorally ratified in 1968.[50] The result has been legislatively anointed the "Constitution of 1968."[51]

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46. Commonwealth *ex rel.* Fell v. Gilligan, 46 A. 124, 125–26 (Pa. 1900) (citation omitted); *see Perkins*, 27 A. at 361 ("[I]t is a fact that notwithstanding the respect which, as citizens of a free commonwealth, we all have for the fundamental law, since 1874 more than 300 bills have been passed by the legislature, which four governors have vetoed because they were unconstitutional, nearly 100 of these because they violated section 7, art. 3, prohibiting local and special laws. In the same time, 33, which received executive approval, have been pronounced unconstitutional by this court, most of them because violative of the same section 7, art. 3.")

47. *Cf. Perkins*, 27 A. at 365 (Mitchell, J., dissenting) ("Article 3, on 'Legislation,' . . . . is a barbed-wire fence around all legislative action, bristling with points of danger even to the most honest and desirable and essential laws.").

48. For a full account of the maneuvering, see Robert Sidman, *Constitutional Revision in Pennsylvania—Problems and Procedures,* 71 W. VA. L. REV. 306, 306 (1969); BRANNING, *supra* note 11, at 127–55; Gedid, *supra* note 24 at 165.

49. *See* PA. BAR ASS'N, PENNSYLVANIA CONSTITUTIONAL REVISION: 1966 HANDBOOK, at viii–ix (1966) (describing failed referenda of 1891, 1921, 1924, 1935 1953, and 1963); WOODSIDE, *supra* note 38, at 579–81 (identifying six electoral rejections of conventions between 1891 and 1963, followed by seriatim amendments electorally ratified in 1966 and 1967 and a convention electorally called in 1967, with revisions electorally ratified in 1968); Gedid, *supra* note 24, at 165 (discussing the failed attempts to revise the 1874 Constitution and how the referendum to hold another convention was approved by the voters in 1967); Sidman, *supra* note 48, at 307–10 (detailing failed referenda in 1921, 1924, 1935, 1953, and 1963);.

50. For details regarding the series of successful and unsuccessful revisions see Sidman, *supra* note 48, at 307–19.

51. 1 PA. CONS. STAT. § 906(b) (2018).

For purposes of this Article, several elements of the rather baroque process that generated the Constitution of 1968 are particularly salient.

First, provisions of the Declaration of Rights of 1776 and 1790, which were retained by the 1838 and 1874 constitutions, contained neither express "due process" nor "equal protection" provisions.[52] The Pennsylvania Bar Association's "Project Constitution," at the outset of the process that led to the Constitution of 1968, proposed an amendment to section 10 of the Declaration of Rights to include wording similar to the U.S. Constitution's Fourteenth Amendment: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws."[53] No such addition made it through the legislative process.

Second, "Project Constitution" proposed two amendments to article I, section 8, which bars unreasonable searches and seizures. One of these proposals would have added to the right to security "from unreasonable searches and seizures *and other invasions of privacy*."[54] The second would have provided: "*Except as proof in a suit or prosecution for the violation of this provision, no evidence obtained as a result of a violation of this provision shall be admissible in any judicial or quasi-judicial or administrative proceeding.*"[55] These proposals also were never adopted.[56]

Third, "Project Constitution" declared that "the extent to which private citizens of the Commonwealth shall be prohibited or discouraged

52. "Equal" appears in article I, section 1 ("All 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."), which originated in 1776, and implies some protection for life, liberty, property and reputation rights. PA. CONST. art. I, § 1; PA. CONST. of 1776, art. I, §1. "Equal" also appears in article I, section 5 ("Elections shall be free and equal"), which originated in 1790. PA. CONST. art. I, § 5; PA. CONST. of 1790, art. IX, § 5.

The protections of article I, section 9 ("In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."), which originated in 1790, make reference to the Magna Carta's "law of the land" provision from which the due process clause is derived, but by their terms apply only to criminal prosecutions. PA. CONST. art. I, § 9; PA. CONST. of 1790, art. IX, § 9; *see* THE TEXT OF THE MAGNA CARTA, *in* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 33, 45 (1964).

And, the requirements of "uniformity of taxation" and the prohibition of "special legislation" from 1874 impose limitations on unequal treatment. PA. CONST. art. VIII, § 1; *id.* art. III, § 32; PA. CONST. of 1874, art. IX, § 1; *id.* art. III, § 7.

53. Pa. Bar Ass'n, *Project Constitution: A Revised Pennsylvania Constitution*, 34 PA. B. ASS'N Q. 147, 226 (1963) [hereinafter Pa. Bar Ass'n, *Project Constitution*].

54. *Id.* at 246.

55. *Id.*

56. *Cf.* Commonwealth v. Murray, 223 A.2d 102, 109–10 (Pa. 1966) (locating a right to privacy in article I, section 1 and article I, section 8 of the Pennsylvania Constitution).

from discriminating against other persons on the basis of race is a question for the legislature," but proposed a new "express and unequivocal" provision barring official discrimination on the basis of race: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right, because of race, color, or national origin."[57] This language was embedded in the proposals for amendment initially introduced into the Pennsylvania Senate in 1965.[58] It was amended by the House to prohibit discrimination because of "race, *creed*, color, *sex*, or national origin."[59] The Senate refused to concur in the amendment on the basis of disagreement with the insertion of protection against sex discrimination.[60] Ultimately, the conference committee reported article I, section 26 in its current form, stating that public actors may not "deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right," and remitting the definition of prohibited denials of civil rights and discrimination to future constitutional construction.[61] The voters of Pennsylvania, faced with the question of whether to adopt an amendment summarized on the ballot to the people of Pennsylvania as "Prohibit discrimination or denial of any person of his civil rights," ratified article I, section 26 on May 16, 1967 by a vote of 1,232,575 to 638,365.[62]

Fourth, at the May 1967 election, the voters faced a ballot question seeking approval of a wholesale amendment of the limits on the

57. Pa. Bar Ass'n, *Project Constitution*, *supra* note 53, at 249.

58. S.B. 530, no. 551, 149th Gen. Assemb., Reg. Sess. (Pa. 1965); *see also* PA. ECON. LEAGUE, INC., COMPARISON OF PROPOSED NEW CONSTITUTIONAL PROVISIONS WITH PENNSYLVANIA'S CURRENT CONSTITUTION 10 (1965); Robert F. Williams, *Pennsylvania's Equality Provisions*, *in* THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES, *supra* note 5, at 744 ("[R]ace, color, or national origin").

59. S.B. 530, no. 1281, 149th Gen. Assemb., Reg. Sess. (Pa. 1965); Williams, *supra* note 58, at 744. A prior effort to introduce protection against sex discrimination had failed in the Senate. *See* S. JOURNAL, 149th Gen. Assemb., Reg. Sess., at 723–25 (Pa. 1965) (amendment of Sen. Staisey).

60. S. JOURNAL, 149th Gen. Assemb., Reg. Sess., at 937 (Pa. 1965) (Senator McGregor, quoting Elizabeth Johnson, former Director of the Pennsylvania Bureau of Women and Children: "To insert sex into the pending Constitutional Civil Rights Amendment would be to harness ourselves with Constitutional blinders to reality").

61. PA. CONST. art. I, § 26; S. JOURNAL, 149th Gen. Assemb., Reg. Sess., at 1372 (Pa. 1965); *see* PA. BAR ASS'N, *supra* note 49, at 16–17 (reporting legislature "broadened" the initial proposal); PA. BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON PROJECT CONSTITUTION 5–6 (Jan. 1966) (reporting language of 1965 Senate Bill 530).

62. PA. GEN. ASSEMB., BALLOT QUESTIONS AND PROPOSED AMENDMENTS TO THE PENNSYLVANIA CONSTITUTION: A COMPILATION WITH STATISTICS FROM 1958 TO 1997, at 13 (1998), http://jsg.legis.state.pa.us/resources/documents/ftp/publications/1998-75-BALLOT%20QUESTIONS%20REPORT.pdf.

legislature adopted by the Constitution of 1874. The descriptive question that faced the ratifying voters was even more opaque than the description of the prohibition of "discrimination."[63]

Among other changes, the text of this omnibus amended article broadened the constitutional prohibition of "special laws." The 1874 Constitution had prohibited the adoption of "special laws" regarding twenty-six specified subjects.[64] The new provision, article III, section 32, reduced the number of specified subjects to eight, but prefaced the list with a command applicable to all statutes adopted by the Pennsylvania Legislature: "The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law . . . ."[65] Voters ratified the proposal by a vote of 1,233,709 to 621,381.[66]

Fifth, a ballot question presented in the May 1967 election sought authority to convene a constitutional convention, limited to addressing proposals to amend the structural articles of the constitution including the Judiciary, Reapportionment, State Finance, and Local Government Articles, but specifically excluding the Tax Uniformity Clause.[67] The

63. According to a record of the questions, it read as follows:

> Shall articles three, ten and eleven of the Constitution relating to legislation be consolidated and amended to modernize provisions relating to the powers, duties and legislative procedures of the legislature; removing the limitation on the classification of municipalities; establishing a system of competitive bidding on State purchases; restricting the legislative power on special and local legislation; incorporating an unnumbered section relating to land title registration and repealing duplicate provisions made obsolete by this consolidation?

INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOC. RESEARCH, REFERENDA AND PRIMARY ELECTION MATERIALS: PART 10: REFERENDA ELECTIONS FOR PENNSYLVANIA 3–4 (2002), https://cdn.ballotpedia.org/images/f/f2/Referenda_Elections_for_Pennsylvania_1967-1990.pdf. The Pennsylvania General Assembly's 1998 Ballot Questions and Proposed Amendments Compilation gives the summary as "[s]treamline legislative process of competitive bidding for State purchases where possible." PA. GEN. ASSEMB., *supra* note 62, at 14.

64. PA. CONST. of 1874, art. III, § 7.

65. *See* PA. CONST. art. III, § 32; PA. BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON PROJECT CONSTITUTION, *supra* note 61, at 8 (reporting on 1965 Senate Bill 532: "In view of the broad prohibition with which the section begins it would be unnecessary to specify any special subjects on which local or special legislation should not be enacted."); Marritz, *supra* note 34, at 203.

66. PA. GEN. ASSEMB., *supra* note 62, at 14.

67. *See* 1967 Pa. Laws 7, § 7(b) ("The convention shall not consider or include in its recommendations any proposal which clearly permits or prohibits the imposition of a graduated income tax by the Commonwealth or any of its political subdivisions nor shall that part of Article IX, Section 1 of the Constitution providing that: 'All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general law . . .' be modified, altered or changed in any respect whatsoever . . . ." (alteration in original)).

The ballot question asked voters to approve a convention tasked with:

electorate approved the proposal by a vote of 1,140,931 to 703,576.[68] The amended judiciary article proposed by the convention and ratified by voters on April 23, 1968, retained a modified system for the contested election of judges for ten-year terms, followed by uncontested retention elections.[69] A subsequent proposed amendment that would have provided for merit selection of judges was narrowly defeated on May 29, 1969, by a vote of 643,960 to 624,453.[70]

The flowering of constitutional revision of the late 1960s closed with the electoral approval on May 18, 1971, of two amendments introduced during the 1969–1970 Legislative session: the Equal Rights Amendment, approved by a vote of 783,441 to 464,882;[71] and the Environmental Rights Amendment, approved by a vote of 1,021,342 to 259,979.[72]

> [P]repar[ing] for submission to the electorate proposals for the revision of the subject matter of any amendment proposed, but not approved, at the May 1967 Primary and for the revision of Sections 16, 17 and 18 of Article II and of Articles V, XIII, XIV, and IX (excluding Section 18 and the Uniformity Clause of Section 1 of Article IX as provided in Section 7 (b) of this Act).

INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOC. RESEARCH, *supra* note 63, at 1–2; *see* Amidon v. Kane, 279 A.2d 53, 58 (Pa. 1971) ("Legislative proposals to amend the Uniformity Clause were rejected by the electorate in 1913 and 1928, and the May, 1967 referendum . . . specifically provided that the convention would *not* revise that portion of the constitution." (footnote omitted)).

68. PA. GEN. ASSEMB., *supra* note 62, at 13.

69. PA. CONSTITUTIONAL CONVENTION 1967–1968, PROPOSALS FOR REVISION OF THE CONSTITUTION OF PENNSYLVANIA ADOPTED BY THE CONSTITUTIONAL CONVENTION OF 1967–1968, at 32–33 (1968), https://www.duq.edu/Documents/law/pa-constitution/_pdf/conventions/1967-68/constitutional-prop.pdf; INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOC. RESEARCH, *supra* note 63, at 15–16; PA. GEN. ASSEMB., *supra* note 62, at 19.

70. PA. CONSTITUTIONAL CONVENTION 1967–1968, *supra* note 69, at 31; PA. GEN. ASSEMB., *supra* note 62, at 21.

71. PA. GEN. ASSEMB., *supra* note 62, at 23 (Question 2 on the ballot). It can now be found at PA. CONST. art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.").

72. PA. GEN. ASSEMB., *supra* note 62, at 23 (Question 3 on the ballot). It can now be found at PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."); *see* Robinson Township v. Commonwealth, 83 A.3d 901, 961–62 (Pa. 2013) ("[T]he proposed Environmental Rights Amendment received the unanimous assent of both chambers during both the 1969–1970 and 1971–1972 legislative sessions. Pennsylvania voters ratified the proposed amendment of the citizens' Declaration of Rights on May 18, 1971, with a margin of nearly four to one, receiving 1,021,342 votes in favor and 259,979 opposed." (citation omitted)); *cf.* Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 596 n.1 (Pa. 1973) (Jones, C.J., dissenting) (noting that the amendment received more affirmative votes than any candidate seeking election to statewide office that same day).

II. FIFTY YEARS OF INDEPENDENT JUDICIAL REVIEW UNDER THE CONSTITUTION OF 1968

The Pennsylvania Supreme Court is bound by the Supremacy Clause to apply the provisions of the Federal Constitution as the United States Supreme Court construes them. But it has long recognized that it is free to apply the Pennsylvania Constitution to provide independent rights and impose independent obligations. The classic formulation is that the United States Constitution provides a "floor" but not a "ceiling."[73] Over the first half-century of adjudication under the Constitution of 1968, the Court has regularly engaged in independent constitutional review in ways that change rights and obligations from the federal baseline. Analysis of these cases leads to three conclusions:

i. Exercise of independent constitutional review is not a once-in-a-lifetime or once-in-a-decade experience under the 1968 Constitution. Over half a century, the Pennsylvania Supreme Court has exercised independent review on average in seven cases a year. It has invalidated or modified statutes in light of the demands of the Pennsylvania Constitution at an aggregate rate of more than twice a year. Independent review is not the province of an idiosyncratic group of jurists. Thirty-two justices have authored opinions undertaking independent constitutional review, and twenty-five have deployed the 1968 Constitution to review statutes.[74] Among the sitting justices, only Justice Mundy has not yet authored such an opinion.

ii. Pennsylvania's constitution contains provisions that parallel the wording of federal guarantees, provisions that address similar norms in congruent wording, and provisions that are wholly disanalogous to federal provisions. Independent review of actions by prosecutors, courts, and law enforcement officers in the area of criminal procedure has focused on provisions whose text directly parallels federal provisions, prominently Pennsylvania's protections against unreasonable searches and seizures,[75] and its guaranties regarding the rights of the accused in criminal

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The electorate also approved an amendment that allowed a verdict, in a civil case, to be rendered by no less than five-sixths of the jury. PA. CONST. art. I, § 6; PA. GEN. ASSEMB., *supra* note 62, at 23 (Question 1 on the ballot).

73. *E.g.*, Thomas G. Saylor, *Fourth Amendment Departures and Sustainability in State Constitutionalism*, 22 WIDENER L.J. 1, 2 (2012) (quoting Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 425–26 (1974)).

74. *See infra* App. B.

75. PA. CONST. art. I, § 8 ("Security from Searches and Seizures").

prosecutions.[76] By contrast, independent constitutional review of statutes rests mainly on state constitutional provisions that are congruent with federal provisions but not precisely parallel, and on provisions that have no federal counterparts.

iii. The Pennsylvania Constitution is not, as the late Justice Scalia would have it, "dead, dead, dead."[77] The Pennsylvania Supreme Court has engaged in a continuing process of judicial statesmanship that looks to text, history, structure, and ongoing doctrinal elaboration to bring evolving constitutional traditions and values to bear on the issues confronting the Commonwealth.[78] This process is not always unanimous, or without contention, but it is exactly what the people of the Commonwealth had reason to expect when they reenacted the constitution in 1968.

A. The Frequency of Independent Constitutional Review: The Size of the Dragon

In half a century of adjudication under the 1968 Constitution, judicial review under the Pennsylvania Constitution has been a regular feature of the work of the Pennsylvania Supreme Court. The 373 cases in which independent Pennsylvania judicial review has occurred have been spread out over the five decades. In the aggregate, the current court is neither abnormally assertive, nor abnormally deferential compared to its recent predecessors.[79]

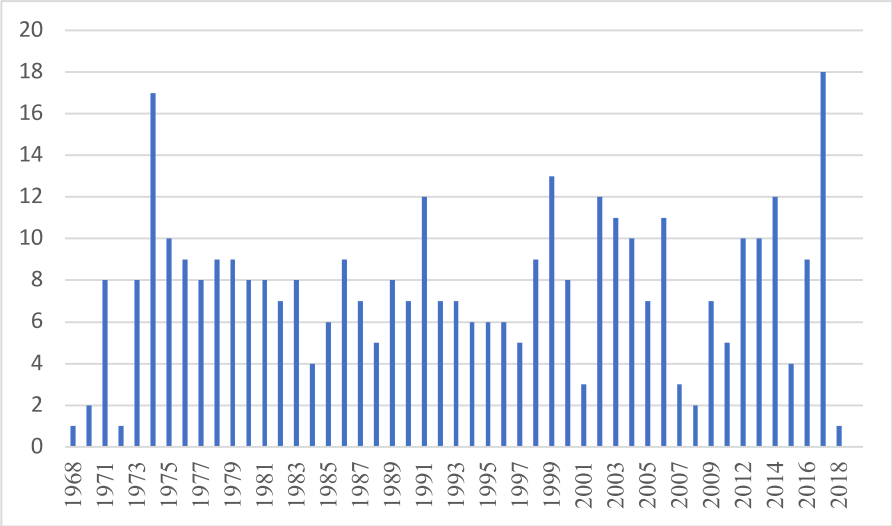
76. *Id.* art. I, § 9 ("Rights of Accused in Criminal Prosecutions").

77. *See* Prakash, *supra* note 10, at 27 (quoting Justice Scalia referring to the Federal Constitution).

78. *Compare* Saylor, *supra* note 4, at 309–12 ("[C]ourts should at the outset identify the constitutional value or norm at issue . . . [and determine] whether the salient, constitutional value is, in some way, under-protected by the application of the prevailing rule or standard," and follow an "exercise [in] practical judgment," involving "a predictive comparison of possible outcomes from the application of various candidate doctrinal forms"), *with id.* at 325 ("Many constitutional questions lack answers that can be proved correct by straightforward chains of rationally irresistible arguments."). *See, e.g.*, *In re* Bruno, 101 A.3d 635, 660 n.13 (Pa. 2014) (quoting Saylor with approval); Robinson Township v. Commonwealth, 83 A.3d 901, 944–50 (2013) (same).

79. On the other hand, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) has been cited ten times in the last twelve years by majority or concurring opinions after a decade of hiatus since its citation in *Commonwealth v. Edmunds*, 586 A.2d 887, 898 n.10 (Pa. 1991). *See* Commonwealth v. Derhammer, 173 A.3d 723, 733 (Pa. 2017) (Wecht, J., concurring); William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 418 (Pa. 2017); Commonwealth v. Donahue, 98 A.3d 1223, 1243 n.3 (Pa. 2014) (Castille, C.J., concurring); *Robinson Township*, 83 A.3d at 927; Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth, 77 A.3d 587, 596 (Pa. 2013); Holt v. 2011 Legislative Reapportionment Comm'n, 38 A.3d 711, 734 (Pa. 2012) (per curiam); Jefferson Cty. Court Appointed Emps. Ass'n v. Pa. Labor Relations Bd., 985 A.2d 697, 707 (Pa. 2009); Commonwealth v. Judge, 916 A.2d 511, 524 (Pa. 2007); Glen-Gery Corp. v. Zoning Hearing Bd., 907 A.2d 1033, 1037 (Pa. 2006); Stilp v.

Chart 1: Independent Judicial Review by Year, 1968–2018[80]



Commonwealth, 905 A.2d 918, 971 (Pa. 2006). This may suggest a somewhat more aggressive approach to judicial review in the last decade. Or simply a resurgent fondness for Chief Justice Marshall.

80. The data in Chart 1, and subsequent charts includes decisions in the fifty years between electoral ratification on April 23, 1968, and April 23, 2018. Thus the 1968 entry represents eight months, and the 2018 entry represents four months.

Table 1: Pennsylvania Independent Judicial Review by Year, 1968–2018

1968	1	1994	6
1970	2	1995	6
1971	8	1996	6
1972	1	1997	5
1973	8	1998	9
1974	17	1999	13
1975	10	2000	8
1976	9	2001	3
1977	8	2002	12
1978	9	2003	11
1979	9	2004	10
1980	8	2005	7
1981	8	2006	11
1982	7	2007	3
1983	8	2008	2
1984	4	2009	7
1985	6	2010	5
1986	9	2012	10
1987	7	2013	10
1988	5	2014	12
1989	8	2015	4
1990	7	2016	9
1991	12	2017	18
1992	7	2018	1
1993	7	**Total**	**373**

Independent state constitutional review has addressed each of the branches of state government under the 1968 Constitution, as well as municipal decision makers. The Pennsylvania Supreme Court has deployed the Pennsylvania Constitution to review statutes, criminal trial procedure, the actions of law enforcement officials, state executive officers, and municipal governments. Review of statutes is by far the most frequent posture.

Chart 2: Actions Reviewed

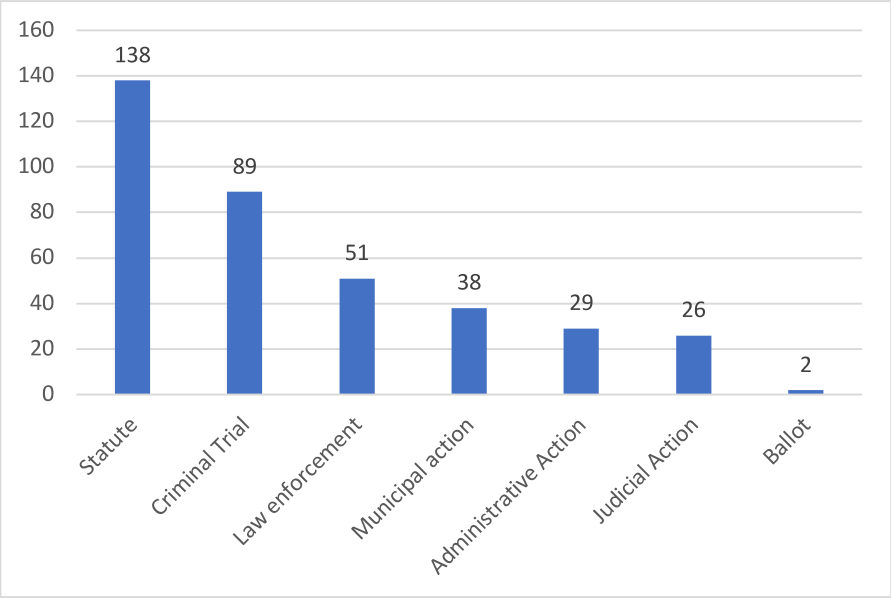


Table 2: Actions Reviewed

Statute	138
Criminal Trial	89
Law enforcement	51
Municipal Action	38
Administrative Action	29
Judicial Action	26
Ballot	2
Grand Total	**373**

In two-thirds of these cases, the state constitutional violation was fully independent—the action under review did not transgress federal constitutional constraints. The pattern differs greatly, however, among the subjects of review.

In the area of criminal trials, only a minority (37%) of the Pennsylvania constitutional decisions were fully independent; most overlapped with federal violations, and the opinions found both state and

federal violations. Half of the cases involving actions by law enforcement (51%) found state but no federal violations. By contrast, the proportion of fully independent state constitutional violations rose to 80% with respect to review of statutes, 90% in review of actions by state executive officials and agencies, and 92% in review of municipal actions.

Table 3A: Federal Violation as well as State Violation

Federal Violation	Cases
No	254
Yes	117
Remand	2
Total	**373**

Table 3B: Federal Violation by State Action

Statute	**138**
No	111
Yes	27
Criminal Trial	**89**
Yes	54
No	33
Remand	2
Law enforcement	**51**
Yes	26
No	25
Municipal action	**38**
No	35
Yes	3
Administrative Action	**29**
No	26
Yes	3
Judicial Action	**26**
No	21
Yes	5
Ballot	**2**
No	2
Total	**373**

The most contentious exercise of review, the most frequent, and the one that recently occasioned threat of wholesale impeachment,[81] is invalidation of the work of the Pennsylvania Legislature. While the current court has been active in constitutional review of statutes, the level of deference to legislative determination does not fall outside of the bounds of historical norms, whether judged by all reviews of statutes or by reviews under independent Pennsylvania norms.

Chart 3: Statutory Review by Year

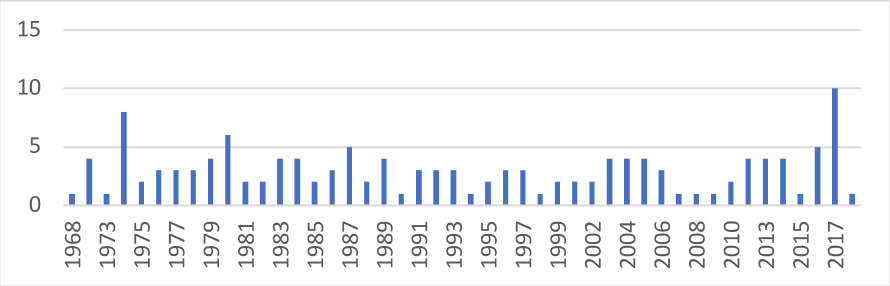
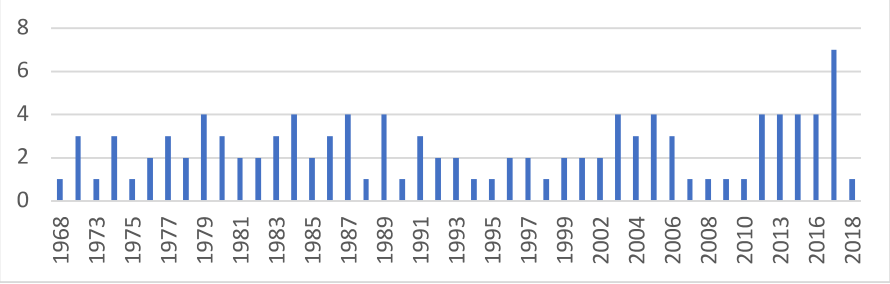


Chart 4: Statutory Review by Year Without a Federal Violation



The Pennsylvania Supreme Court can avoid direct confrontation with other branches of government by construing statutes, rules, and regulations to avoid conflict with state constitutional norms, or remanding cases for further determination in light of constitutional constraints. The court adopts this strategy in roughly 20% of cases reviewed in the past fifty years. In roughly a quarter of cases involving

81. For more on the recent threat of impeachment due to the court's exercise of judicial review, see *supra* note 3 and accompanying text.

statutory review, the court has deployed constitutional norms as occasions for statutory construction, trimmed statutes to avoid constitutional violations, or remanded for further adjudication rather than invalidating them outright.

Table 4A: Invalidation and Avoidance—All State Action

Invalidation	293
Statutory construction[82]	51
Remand	29
Total	**373**

Table 4B: Invalidation and Avoidance—Statutes

Invalidation	100
Statutory construction	32
Remand	6
Total	**138**

B. Teeth and Claws: The Constitutional Claims

The Pennsylvania Supreme Court has exercised independent judicial review under the Constitution of 1968 in 373 cases. Of these, 138 involved statutory review. The tables that follow illustrate the relative frequency of different types of claims.

In the aggregate sample of 373, claims under provisions constraining the criminal process (147) accounted for the most exercises of review, followed by cases vindicating provisions requiring uniform taxation and equal treatment (47),[83] cases limiting oppression under article I, section 1 (42), and cases protecting judicial autonomy (38).

Among the 138 cases reviewing statutes, successful claims involving equal treatment and tax uniformity (31) were most common, followed by protection of judicial autonomy (23), and claims involving criminal process (11).

82. This category refers not only to construction of statutes but also to municipal codes and state regulations.

83. Between 1971 and 1979, Pennsylvania's Equal Rights Amendment ("ERA") was deployed successfully almost twice a year. The pace of ERA cases abated in 1979 with the adoption of a statutory presumption of gender symmetry. *See* George v. George, 409 A.2d 1, 2 (Pa. 1979) (quoting 1 PA. CONS. STAT. § 2301 (1978): "where in any statute heretofore enacted there is a designation restricted to a single sex, the designation shall be deemed to refer to both sexes unless the designation does not operate to deny or abridge equality of rights under the law of this Commonwealth . . . .").

Table 5: Total Cases by Provision

Criminal Process	**147**
Art. I, § 9	74
Art. I, § 8	57
Art. I, § 10	14
Art. I, § 14	1
Art. I, § 6	1
Judicial Autonomy and Administration	**38**
Art. V, § 10	18
Art. V, § 18	4
Art. V, § 16	3
Art. V, § 1	3
Art. V, § 13	3
Art. V, § 9	2
Separation of Powers	2
Art. V, § 12	1
Art. IV, § 9	1
Art. V, § 5	1
Substantive Limits on Undue Oppression Art. I, § 1	**24**
Tax Uniformity Art. VIII, § 1	**20**
Art. VIII, § 1	17
Art. VIII, § 2	3
ERA Art. I, § 28	**14**
Equal Treatment Art. III, § 32	**13**
Reputation and Privacy Art. I, § 1	**12**
Limits on Municipal Action	**12**
Art. III, § 27	4
Art. IX, § 2	3
Art. VI, § 7	2
Separation of Powers	1
Art. III, § 14	1
Art. IX, § 10	1
Cruel Punishment Art. I, § 13	**10**
Remedies Art. I, § 11	**9**

Non-Delegation	**9**
Art. II, § 1	8
Art. VI, § 7	1
Freedom of Expression Art. I, § 7	**8**
Taking Art. I, § 10	**8**
Limits on Legislative Process	**8**
Art. III, § 9	2
Art. IV, § 8	1
Separation of Powers	1
Art. VI, § 7	1
Art. III, § 11	1
Art. II, § 2	1
Art. II, § 15	1
Impairment of Contracts Art. I, § 17	**7**
Single-Subject Rule	**6**
Art. III, § 3	5
Art. XI, § 1	1
Procedural Limits Art. I, § 1	**6**
Jury Trial Art. I, § 6	**5**
Ex Post Facto Art. I, § 17	**4**
Limits on Executive Action	**4**
Art. VI, § 1	1
Art. IV, § 16	1
Art. II, § 2	1
Art. IV, § 15	1
Elections	**3**
Art. I, § 5	2
Art. II, § 17	1
Environmental Art. I, § 27	**3**
Religious Freedom Art. I, § 3	**2**
Education Art. III, § 14	**1**
Total	**373**

Table 6: Statutory Review by Provision

Judicial Autonomy and Administration	**23**
Art. V, § 10	14
Art. V, § 1	3
Art. V, § 16	2
Art. V, § 13	1
Separation of Powers	1
Art. IV, § 9	1
Art. V, § 12	1
Equal Treatment Art. III, § 32, Art. I, § 1	**12**
Criminal Process	**11**
Art. I, § 9	5
Art. I, § 8	5
Art. I, § 10	1
ERA Art. I, § 28	**10**
Non-Delegation	**9**
Art. II, § 1	8
Art. VI, § 7	1
Tax Uniformity Art. VIII, § 1	**9**
Art. VIII, § 1	8
Art. VIII, § 2	1
Reputation and Privacy Art. I, § 1	**8**
Substantive Limits on Undue Oppression Art. I, § 1	**7**
Impairment of Contracts Art. I, § 17	**7**
Remedies Art. I, § 11	**6**
Limits on Legislative Process	**6**
Art. III, § 9	2
Art. II, § 15	1
Art. VI, § 7	1
Art. II, § 2	1
Art. III, § 11	1
Single-Subject Rule	**5**
Ex Post Facto Art. I, § 17	**4**
Freedom of Expression Art. I, § 7	**4**
Taking Art. I, § 10	**3**

Elections Art. I, § 5	**3**
Art. I, § 5	2
Art. II, § 17	1
Jury Trial Art. I, § 6	**3**
Limits on Municipal Action	**2**
Art. III, § 27	2
Cruel Punishment Art. I, § 13	**2**
Environmental Art. I, § 27	**2**
Education Art. III, § 14	**1**
Religious Freedom Art. I, § 3	**1**

III. PARALLEL, CONGRUENT, AND SKEW PROVISIONS IN PENNSYLVANIA CONSTITUTIONAL LAW

There is a lively debate among academic jurisprudes about the degree to which state constitutional analysis should give primary attention to the language of the commands embodied in text when state courts interpret their constitutions.[84] In the Pennsylvania Supreme Court, constitutional text exerts substantial claims as a "touchstone" or "polestar".[85] In thinking about Pennsylvania's approach to the New Judicial Federalism under the Constitution of 1968, it seems useful to

84. *E.g.*, James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 121–22, 129 (1998); James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1250–52 (2005); Liu, *supra* note 4, at 1321–28.

85. In the last decade, the Pennsylvania Supreme Court opinions have echoed the proposition that "[o]ur ultimate touchstone is the actual language of the Constitution itself." Washington v. Dep't of Pub. Welfare of Pa., 188 A.3d 1135, 1149 (Pa. 2018) (alteration in original) (quoting Stilp v. Commonwealth, 905 A.2d 918, 939 (Pa. 2006) (quoting Firing v. Kephart, 353 A.2d 833, 835–36 (Pa. 1976))); *see also* League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 802 (Pa. 2018) ("The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself." (citing Ieropoli v. AC & S Corp., 842 A.2d 919, 925 (Pa. 2004))); Yocum v. Commonwealth Gaming Control Bd., 161 A.3d 228, 239 (Pa. 2017) (quoting Buckwalter v. Borough of Phoenixville, 985 A.2d 728, 730 (Pa. 2009)); Sprague v. Cortes, 145 A.3d 1136, 1154 (Pa. 2016) (Wecht, J., concurring) ("[O]ur 'ultimate touchstone is the actual language . . . .' [W]e may consider, *inter alia*, the 'text; history (including constitutional convention debates, the address to the people, [and] the circumstances leading to the adoption of the provision); structure; underlying values; and interpretations of other states.'" (alteration in original) (quoting Robinson Township v. Commonwealth, 83 A.3d 901, 944 (Pa. 2013))); Zauflik v. Pennsbury Sch. Dist., 104 A.3d 1096, 1124 (Pa. 2014) ("[T]he polestar of constitutional analysis undertaken by the Court must be the plain language of the constitutional provisions at issue." (quoting *In re* Bruno, 101 A.3d 635, 659 (Pa. 2014))).

divide constitutional provisions into three groups on the basis of the relation between the wording and import of the state provisions and those contained in the Federal Constitution: parallel provisions, congruent provisions, and skew provisions. Each type raises distinct interpretive issues.

Parallel provisions track[86]—or provide the template for—federal provisions. Thus, for example, the terms of article I, section 8—initially adopted in 1790, and largely prefigured in 1776—and those of the Fourth Amendment are virtually identical.[87] It is here that the gravitational pull of federal jurisprudence is strongest.

Congruent provisions govern issues and embody norms that are also addressed by the Federal Constitution but utilize distinctive wording and often have distinctive history. Pennsylvania's protections of free expression, which antedate the free expression protections of the First Amendment, address the same issues in similar though not identical

86. *Cf.* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 237 n.4 (1984) ("The Court has previously determined that abstention is not required for interpretation of parallel state constitutional provisions." (citing Examining Bd. v. Flores de Otero, 426 U.S. 572, 598 (1976))).

87. *Compare* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."), *with* PA. CONST. art. I, § 8 ("The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant."), *and* PA. CONST. of 1776, ch. I, § X ("[T]he people have a right to hold themselves, their houses, papers, and possessions free from search and seizure . . . .").

terms.[88] Its equality provisions diverge substantially in wording from their federal counterparts, but embody cognate norms.[89]

Finally, like most state constitutions, the Pennsylvania Constitution of 1968 is well endowed with what might be described as disanalogous or skew provisions.[90] These constitutional constructions have no parallel in the federal structure; they go off in another direction entirely. Thus, Pennsylvania constitutional provisions such as the Single Subject Rule, adopted in 1864;[91] the definition of the authority of the supreme court over judicial administration, adopted in 1968;[92] and its Environmental Rights provision, adopted in 1971,[93] have neither parallel nor correlate in the federal canon. Charts 5 and 6 illustrate the distribution of these types of provisions in the census.

88. *Compare* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."), *with* PA. CONST. art. I, § 7 ("The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."), *and id.* art. I, § 20 ("The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance."). *See generally* Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 J. CONST. L. 12 (2002).

89. *See* discussion of equality provisions *infra* Section III.B.2.

90. Those, like the author, for whom geometry is a somewhat distant memory can refresh their recollections regarding lines that are neither parallel nor intersecting at *Skew Lines*, WIKIPEDIA, https://en.wikipedia.org/wiki/Skew_lines (last visited Dec. 30, 2018).

91. PA. CONST. art. III, § 3; PA. CONST. of 1874, art. III, § 3; PA. CONST. of 1838, art. XI § 1, *amended by* 1864 Pa. Laws 1054.

92. PA. CONST. art. V, § 10.

93. PA. CONST. of 1968, art. I, § 27 (1971).

Chart 5: Judicial Review by Provision Type—All Action

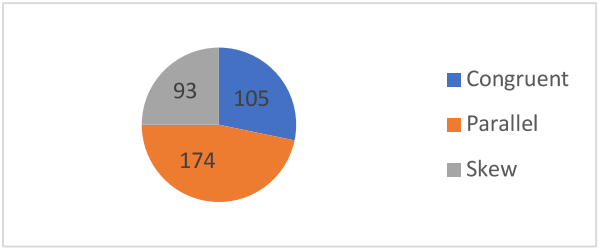
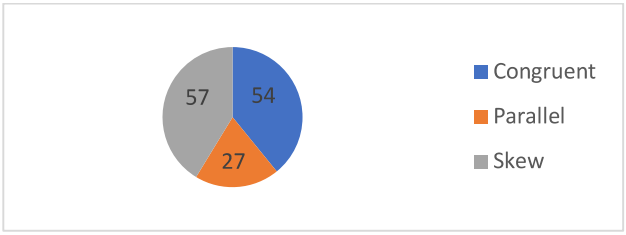


Chart 6: Judicial Review by Provision Type—Statutes



A. Parallel Provisions

Parallel provisions accounted for almost half (47%) of the cases construing the 1968 Constitution, but only 31% of cases which find violations of state but not federal constitutions. Over half (54%) of the cases involving these provisions also find federal violations. Parallel provision cases are concentrated in judicial control of the criminal justice system: criminal trials and searches. They involve only a handful of provisions of the Declaration of Rights.[94]

Invocations of parallel provisions comprise all but two of the 147 cases involving criminal process, but account for only 20% of the cases in which the Pennsylvania Supreme Court confronts the legislature by exercising judicial review over statutes.

94. PA. CONST. art. I, § 8 (search and seizure); *id.* art. I, § 9 (rights of accused); *id.* art. I, § 10 (double jeopardy and taking); *id.* art. I, § 13 (cruel punishments); *id.* art. I, § 17 (ex post facto and impairment of contracts).

Table 7: Constitutional Review Under Parallel Provisions

Criminal Process Art. I, §§ 8, 9, 10	145
Cruel Punishment Art. I, § 13	10
Taking Art. I, § 10	8
Impairment of Contracts Art. I, § 17	7
Ex Post Facto Art. I, § 17	4
Total	**174**

Table 8: Finding State but No Federal Violation Under Parallel Provisions

Criminal Process	**62**
Art. I, § 8	31
Art. I, § 9	29
Art. I, § 10	2
Impairment of Contracts Art. I, § 17	**6**
Taking Art. I, § 10	**5**
Cruel Punishment Art. I, § 13	**5**
Total	**78**

Table 9: Statutory Review Under Parallel Provisions

Criminal Process	**11**
Art. I, § 8	5
Art. I, § 9	5
Art. I, § 10	1
Impairment of Contracts Art. I, § 17	**7**
Ex Post Facto Art. I, § 17	**4**
Taking Art. I, § 10	**3**
Cruel Punishment Art. I, § 13	**2**
Total	**27**

The canonical modern codification of the "factors to be briefed and analyzed by litigants in each case hereafter implicating a provision of the Pennsylvania constitution" was set forth by Justice Cappy in *Commonwealth v. Edmunds*, a case explicating the Pennsylvania Court's divergence from federal jurisprudence in the constitutional adjudication of searches and seizures:

> The recent focus on the "New Federalism" has emphasized the importance of state constitutions with respect to individual rights and criminal procedure. . . . [I]t is important that litigants brief and analyze at least the following four factors:
>
> 1) text of the Pennsylvania constitutional provision;
>
> 2) history of the provision, including Pennsylvania case-law;
>
> 3) related case-law from other states;
>
> 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.[95]

While the application of *Edmunds* has regularly occasioned debate on the Pennsylvania Supreme Court, the practice of looking to the *Edmunds* factors in criminal procedure cases involving parallel state constitutional provisions has become deeply entrenched.[96] And, as Chief Justice Saylor has observed, in crafting state prophylactic rules for governance of the criminal process that may diverge from federal doctrine, the Pennsylvania Supreme Court can draw on the explicit authority given to that court by the 1968 Constitution to establish rules for the governance of the judicial system.[97]

95. 586 A.2d 887, 895 (Pa. 1991). The *Edmunds* Court applied the four factors and concluded that "a 'good faith' exception to the exclusionary rule would frustrate the guarantees embodied in Article I, Section 8 of our Commonwealth's constitution." *Id.*; *cf. id.* at 898 ("During the first decade after *Mapp*, our decisions in Pennsylvania tended to parallel the cases interpreting the 4th Amendment. However, beginning in 1973, our case-law began to reflect a clear divergence from federal precedent. . . . [T]his Court began to forge its own path under Article I, Section 8 of the Pennsylvania Constitution, declaring with increasing frequency that Article I, Section 8 of the Pennsylvania Constitution embodied a strong notion of privacy, notwithstanding federal cases to the contrary.").

96. A LEXIS search of Pennsylvania Supreme Court cases reveals fifty-four references to *Edmunds* and article I, section 8; fourteen references to *Edmunds* and article I, section 9; and nine references to *Edmunds* and article I, section 10. For an enumeration of criminal procedure cases involving independent constitutional interpretation, see *infra* App. C.

97. Saylor, *supra* note 4, at 284, 309 (citing PA. CONST. art. V, § 10).

Competent attorneys who practice criminal law in the Pennsylvania courts are well aware of the potential to argue for variant readings of identical constitutional language. As a result, they raise the arguments; in response the Pennsylvania Supreme Court has elaborated an extensive fabric of Pennsylvania case law interpreting protections regarding searches, seizures, and criminal trials. The Pennsylvania justices are equally aware of the potential to push evolution of federal interpretation while holding the possibility of independent interpretation as a backup.[98]

B. Congruent Provisions

Congruent provisions embody norms analogous to those found in federal constitutional law but diverge from the text of the federal models. Claims brought under these provisions account for 105 (28%) of the 373 cases exercising review over government actions under the 1968 Constitution, and 84 (33%) of the 253 cases which find violations of state but not federal constitutional provisions. They constitute 54 (39%) of the 138 cases exercising judicial review over statutes. The most prevalent grounds for judicial review in this group involve article I, section 1's protection of "inherent and indefeasible rights" (41 cases) and cases under Pennsylvania's constitutional variant equality protections, embodied in the mandates of tax uniformity, the equal rights amendment, and the prohibitions on special legislation and discrimination (47 cases).[99]

98. *E.g.*, Commonwealth v. Fulton, 179 A.3d 475, 479 & n.3 (Pa. 2018) (granting relief for opening cell phone under emerging federal constitutional analysis, but noting "[b]ecause of the manner by which we decide this case, we need not address Fulton's claim under Article I, Section 8."); *cf.* Commonwealth v. Muniz, 164 A.3d 1189, 1193, 1223 (Pa. 2017) (finding federal violation, then performing an *Edmunds* analysis to find the state ex post facto clause affords greater protections than its federal counterpart, and that SORNA's registration provisions (Sex Offender Registration and Notification Act) constituted punishment and violated both federal and state ex post facto clauses); Kuren v. Luzerne Cty., 146 A.3d 715, 751 (Pa. 2016) (upholding cause of action for constitutionally inadequate funding under Federal Constitution, but finding a potential violation of article I, section 9 nonetheless); *id.* at 732 n.6 ("We do not provide a separate discussion of the right to counsel enshrined in Article I, Section 9 of the Pennsylvania Constitution. It is now well-settled that the right to counsel recognized in Article I, Section 9 and in the Sixth Amendment of the United States Constitution are jurisprudentially coextensive.").

99. The Pennsylvania Supreme Court in earlier decades pushed beyond the federal floor in protecting rights of free expression. *See, e.g.*, DePaul v. Commonwealth, 969 A.2d 536, 546 (Pa. 2009) (protecting political contributions: "This Court has found that Article I, Section 7 provides broader protections of expression than the related First Amendment guarantee in a number of different contexts. *See* [Pap's A.M. v. City of Erie, 571 Pa. 375, 408–11, 812 A.2d 591, 611–12 (2002)] (nude dancing entitled to greater protection under Pennsylvania Constitution); *Commonwealth, Bureau of Prof'l & Occupational Affairs v.*

Table 10: Constitutional Review Under Congruent Provisions

Substantive Limits on Undue Oppression Art I, §1	24
Tax Uniformity Art. VIII, § 1	20
ERA Art. I, § 28	14
Equal Treatment Art. III, § 32, Art. I, § 26	13
Reputation and Privacy Art. I, § 1	12
Freedom of Expression Art. I, § 7	8
Jury Trial Art. I, § 6	5
Procedural Limits Art. I, § 1	5
Religious Freedom Art. I, § 3	2
Criminal Process Art. I, § 14	2
Total	**105**

State Bd. of Physical Therapy, 556 Pa. 268, 728 A.2d 340, 343–44 (1999) (commercial speech in form of advertising by chiropractors entitled to greater protection so long as not misleading); *Ins. Adjustment Bureau v. Ins. Comm'r*, 518 Pa. 210, 542 A.2d 1317, 1324 (1988) (Article I, Section 7 does not allow prior restraint or other restriction of commercial speech by governmental agency where legitimate, important interests of government may be accomplished in less intrusive manner); *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382, 1391 (1981) ([enforcement of private prohibition of political leafleting on college campus violated Article I, Section 7 where First Amendment posed no bar]); *Goldman Theatres v. Dana*, 405 Pa. 83, 173 A.2d 59, 64 (1961), *cert. denied*, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1961) (statute providing for censorship of motion pictures, while not necessarily violative of First Amendment, violates Article I, Section 7).").

But it seems unlikely in the near future that the Pennsylvania justices will exceed the speech-protective enthusiasm of the current majority of the United States Supreme Court. *Cf. e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) ("The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. . . . by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2382 (2018) (Breyer, J., dissenting) ("In the name of the First Amendment, the majority today treads into territory where the pre-New Deal, as well as the post-New Deal, Court refused to go.").

Table 11: Finding State but No Federal Violation Under Congruent Provisions

Substantive Limits on Undue Oppression Art. I, § 1	22
Tax Uniformity Art. VIII, § 1	17
ERA Art. I, § 28	12
Reputation and Privacy Art. I, § 1	11
Equal Treatment Art. III, § 32	7
Jury Trial Art. I, § 6	5
Freedom of Expression Art. I, § 7	4
Religious Freedom Art. I, § 3	2
Procedural Limits Art. I, § 1	2
Criminal Process Art. I, § 14	2
Total	**84**

Table 12: Statutory Review Under Congruent Provisions

Equal Treatment Art. III, § 32, Art. I, § 26	12
ERA Art. I, § 28	10
Tax Uniformity Art. VIII, § 1	9
Reputation and Privacy Art. I, § 1	8
Substantive Limits on Undue Oppression Art. I, § 1	7
Freedom of Expression Art. I, § 7	4
Jury Trial Art. I, § 6	3
Religious Freedom Art. I, § 3	1
Total	**54**

1. Article I, Section 1: Liberty, Property, Reputation, and "Due Process" Without Benefit of Text

a. Procedure Without Due Process

Since 1776, the Pennsylvania Constitution has recognized the "inherent" rights of "life," "liberty" and "property"; a protection for "reputation" dates from 1790.[100] Unlike the Federal Constitution, the text of the Pennsylvania Constitution contains no generally applicable procedural guaranties; the words "due process of law" are entirely absent. Yet by the middle of the nineteenth century, well before adoption of the Fourteenth Amendment, the Pennsylvania Supreme Court extended constitutionally based procedural protections against State action, declaring:

> The whole clauses in our constitutions on the subject were established for the protection of personal safety and private property. These clauses address themselves to the common sense of the people, and ought not to be filed away by legal subtleties. They have their foundations in natural justice, and, without their pervading efficacy, other rights would be useless. . . . The great principle is, that a man's property is his own, and that he shall enjoy it according to his pleasure (injuring no other man) until it is proved in a due process of law that it is not his, but belongs to another.[101]

100. *See* PA. CONST. of 1776, art. I, § 1 ("That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."); PA. CONST. of 1790, art. IX, § 1 ("That all 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.").

101. Ervine's Appeal, 16 Pa. 256, 263–64 (1851). At some points, the Pennsylvania Supreme Court rooted protections in the "law of the land" provision (originating in PA. CONST. of 1790, art. IX, § 9), eliding its textual limitation to "criminal prosecutions." *See, e.g.*, Palairet's Appeal, 67 Pa. 479, 485 (1871) ("If, however, an Act of Assembly . . . operates retroactively to take what is, by existing law, the property of one man, and, without his consent, transfer it to another, with or without compensation, it is in violation of that clause in the Bill of Rights, Const., Art. IX., sect. 9, which declares that no man 'can be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.' If this is true of a person accused of crime, to whom literally the words are applied, *à fortiori* is it so as to one against whom no accusation is made."); Craig v. Kline, 65 Pa. 399, 413 (1870) ("If . . . a forfeiture can take place without notice . . . and without an opportunity of being heard . . . then it seems to us to be contrary to the provision in the bill of rights, that no one shall be deprived of his property unless by the judgment of his peers, or the law of

Under the 1968 Constitution, the Pennsylvania Supreme Court has imposed procedural protections that exceed the floor laid by contemporary U.S. Supreme Court doctrine, though it has provided no comprehensive account of the means of discerning the parameters of these protections.[102]

b. "Inherent and Indefeasible Rights": "Acquiring, Possessing and Protecting Property"

Pennsylvania's recognition of "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

the land. The law of the land means by due process of law . . . . The design of the Convention . . . was to exclude arbitrary power from every branch of the government . . . ."); City of Philadelphia v. Scott, 81 Pa. 80, 90 (1876) (finding that statute "does not furnish due process of law, within the protection of the 9th section of the Declaration of Rights . . . . [T]he law must furnish some just form or mode, in which the duty of the citizen shall be determined before he can be visited with a penalty for non-performance of the alleged duty.").

Current doctrine limits "law of the land" protection under section 9 to criminal prosecutions in accordance with its text. *See* R. v. Commonwealth, 636 A.2d 142, 146 (Pa. 1994) ("Section 9 of Article I . . . . is explicitly addressed to 'criminal prosecutions.' However, R. was not criminally prosecuted . . . ."); *id.* at 152 n.10 ("[I]ts guarantees only apply to criminal proceedings."). Modern decisions discern Pennsylvania's general procedural protections in the "emanations" of article I, section 1. *See id.* at 152 ("Even though the term 'due process' appears nowhere in those sections, due process rights are considered to emanate from [article I, section 1]."); Pa. Game Comm'n v. Marich, 666 A.2d 253, 255 n.4 (1995) ("Due process rights emanate from Article I, Section I of the Pennsylvania Constitution."); *cf.* Lyness v. Commonwealth, 605 A.2d 1204, 1207 (1992) ("The guarantee of due process of law, in Pennsylvania jurisprudence, emanates from a number of provisions of the Declaration of Rights, particularly Article I, Sections 1, 9 and 11 of the Pennsylvania Constitution.").

102. *See* Pittman v. Pa. Bd. of Prob. & Parole, 159 A.3d 466, 467–68, 474 (Pa. 2017) (construing the Parole Code in light of the constitutional right to appeal from an administrative agency granted in article V, section 9 to require that the Parole Board must "articulate the basis for its decision to grant or deny a [convicted parole violator] credit for time served at liberty on parole"); *In re* J.B., 107 A.3d 1, 12, 16 n.26, 19–20 (Pa. 2014) ("[T]he Commonwealth fails to speak to the Pennsylvania Constitution's inclusion of reputation as an inherent right under Article I, Section[] 1 . . . . Given that juvenile offenders have a protected right to reputation encroached by SORNA's presumption of recidivism, where the presumption is not universally true, and where there is a reasonable alternative means for ascertaining the likelihood of recidivating, we hold that the application of SORNA's current lifetime registration requirements upon adjudication of specified offenses violates juvenile offenders' due process rights by utilizing an irrebuttable presumption."); City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Breary), 985 A.2d 1259, 1262, 1270–71 (Pa. 2009) (holding that arbitrator's unfair exclusion of critical evidence violated Pennsylvania procedural rights); *Lyness*, 605 A.2d at 1209 ("What our Constitution requires, however, is that if more than one function is reposed in a single administrative entity, walls of division be constructed which eliminate the threat or appearance of bias.").

pursuing their own happiness"[103] provides a stronger textual basis for substantive protection of important interests than do the federal due process clauses. By the middle of the nineteenth century, well before the adoption of the Fourteenth Amendment applied federal protections of liberty and property to the states, the Pennsylvania Supreme Court had interpreted the Pennsylvania Constitution to limit the substantive authority of government to infringe on property and liberty rights. Some opinions relied on the a fortiori argument from the criminal "law of the land" clause to strike down interferences with vested property rights.[104] Others looked to the implicit presuppositions of the constitution.[105] And others invoked the "inherent and indefeasible right" of "acquiring, possessing and protecting property" as part of a constitutional tapestry protecting property to strike down interventions judged excessive or tyrannical.[106]

103. PA. CONST. art. I, § 1.

104. *E.g.*, Reiser v. William Tell Sav. Fund Ass'n, 39 Pa. 137, 145–46 (1861) (relying on "law of the land" provision to hold retroactive removal of usury prohibition unconstitutional, noting that "[t]his section of the Bill of Rights is violated when civil and criminal rights are not both alike tried by due course of law"); Menges v. Dentler, 33 Pa. 495, 497 (1859) (statute validating sheriff's sale held unconstitutional) ("The bill of rights, §§ 9, 11, declares that no man shall be deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land: and that the courts shall be always open to every man, so as to afford remedy by due course of law for all invasions of rights . . . . [T]hey most plainly forbid both the act and the decision."); Shoenberger v. Sch. Dirs., 32 Pa. 34, 39 (1858) (invalidating statute appointing trustees to dispose of property under named will, declaring that "if the property of a citizen who had forfeited the protection of society, could not be taken from him except in due course of law, much less could theirs, for their claims to protection had never been forfeited or impaired"); Brown v. Hummel, 6 Pa. 86, 91 (1847) (holding that legislative interference with execution of will was unconstitutional: "the talismanic words, *I am a citizen of Pennsylvania,* secures to the individual his private rights, unless they are taken from him by a trial, where he has an opportunity of being heard by himself, his counsel, and his testimony, *more majorum,* according to the laws and customs of our fathers, and the securities and safeguards of the constitution"); Norman v. Heist, 5 Watts & Serg. 171, 173 (Pa. 1843) (noting in dictum that a statute allowing illegitimate child to inherit would be a violation of the "law of the land" clause if applied retrospectively).

105. *See* McCabe v. Emerson, 18 Pa. 111, 112–13 (1851) ("I have no hesitation in saying that the Act [overturning final judgment for plaintiff] is unconstitutional and void. The legislature have no power, as has been repeatedly held, to interfere with vested rights. To give the property of A. to B. is clearly beyond legislative authority. . . . There is no limit to successful usurpation. Everything will depend on the will of an irresponsible majority.").

106. *In re* Wash. Ave., 69 Pa. 352, 363–64 (1871) (emphasis omitted) (invalidating tax on street-front property to finance improvements for the benefit of the public).

> When, therefore, the Constitution declares in the ninth article, that among the inherent and indefeasible rights of men is that of acquiring, possessing and protecting property,—that the people shall be secure in their possessions, from unreasonable seizures,—that no one can be deprived of his property unless by the judgment of his peers, or the law of the land—that no man's property shall be taken or applied to public use without just compensation being made—that every man for an injury to his lands or goods shall have remedy by due course of law, and right

After adoption of the 1874 Constitution, the Pennsylvania Supreme Court continued to monitor legislative interferences with property and extended its remit to protect freedom of contract as an "inherent and indefeasible right." Thus, in striking down a statutory imposition of a mechanic's lien, the court declared:

> The legislature has all power not withheld from it by the people in their fundamental law. Article 1, § 1, of the constitution declares that: "All 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, or acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Life, liberty, and property are put upon the same plane, and an indefeasible right to the enjoyment of the first two, and to the acquirement and possession of the third, are placed beyond the power of any department of the government. . . . "The privilege of contracting is both a liberty and a property right" . . . .
>
> . . . .
>
> . . . If there be such power in the legislature as is assumed in the second section of this act, then every business relation between any two persons may be declared that of principal and agent, with unlimited authority in the agent to contract debts which shall bind the property of the principal, in the face of positive agreement to the contrary. Such interference with the indefeasible rights of freedom of contract, in the acquisition and

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and justice administered without sale, denial or delay—and that no law impairing contracts shall be made—and when the people, to guard against transgressions of the high powers delegated by them, declared that these rights are excepted out of the general powers of government, and shall for ever remain inviolate, they, for their own safety, stamped upon the right of private property, an inviolability which cannot be frittered away by verbal criticism on each separate clause, nor the united fagot broken, stick by stick, until all its strength is gone.

. . . .

. . . Like the rain [taxation] may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction.

. . . .

. . . [I]t becomes the judiciary to stand firmly by the fundamental law, in defence [sic] of those general, great, and essential principles of liberty and free government, for the establishment and perpetuation of which the Constitution itself was ordained.

Id. at 363–64 (emphasis omitted).

> protection of property, the people have plainly reserved from legislative power.[107]

During the *Lochner* era, limits imposed by federal and Pennsylvania constitutional constraints on government interferences with rights of property and contract ran along similar lines. With the New Deal Revolution, however, the United States Supreme Court receded from efforts to monitor legislative oppressive adjustments of economic rights and opportunities under the rubric of substantive due process.[108] The Pennsylvania Supreme Court was less emphatic in abandoning the field under article I, section 1.[109]

Under the Constitution of 1968, the Pennsylvania Supreme Court has continued to deploy constitutional protections of property to invalidate zoning ordinances determined to be exclusionary[110] or

107. Waters v. Wolf, 29 A. 646, 651, 653 (Pa. 1894); *see also* McMaster v. W. Chester State Normal Sch., 29 A. 734, 735 (Pa. 1894) (statute invalidating waiver of mechanic's lien is unconstitutional); Godcharles v. Wigeman, 6 A. 354, 356 (Pa. 1886) (invalidating statute forbidding payment of employees in goods, sections of the act are "utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. . . . subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.").

108. The classic progression runs from *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 411–13 (1937), through *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), to *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955).

The United States Supreme Court reentered the field of reviewing commercial regulations under the rubric of the First Amendment in *Bigelow v. Virginia*, 421 U.S. 809 (1975) and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770–71 (1976). In recent Terms, it seems to be widening its scope of intervention. *E.g.*, Janus v. American Fed'n of State, Cty., and Mun. Emps., Council 31, 138 S. Ct. 2448, 2459–60 (2018); Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2376–78 (2018); Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1146–47 (2017).

109. *See* Pa. State Bd. of Pharmacy v. Pastor, 272 A.2d 487, 490–91 (Pa. 1971) ("We have held unconstitutional . . . an act regulating car rental agencies as a public utility . . . an act forbidding gasoline stations from displaying price signs in excess of a certain prescribed size, an act forbidding the sale of carbonated beverages made with sucaryl, an act forbidding the sale of ice-milk milk shakes, and an act forbidding nonsigners from selling fair traded items below the price specified in price maintenance contracts." (citations omitted)); *see also* Willcox v. Penn Mut. Life Ins. Co., 55 A.2d 521, 531 (Pa. 1947) (declaring Community Property Act unconstitutional).

110. *See* C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd., 820 A.2d 143, 158–59 (Pa. 2002) (one-acre minimum lot size); *In re* Appeal of Shore, 573 A.2d 1011, 1012–13 (Pa. 1990) (prohibition of the development of mobile home parks); Geiger v. Zoning Hearing Bd., 507 A.2d 361, 365 (Pa. 1986) (mobile homes); Fernley v. Bd. of Supervisors, 502 A.2d 585, 588 (Pa. 1985) (prohibition of multi-family dwellings); Hopewell Twp. Bd. of Supervisors v. Golla, 452 A.2d 1337, 1344 (Pa. 1982) (regulatory differences between large

arbitrarily oppressive.[111] The Pennsylvania Supreme Court has retained a distinctive doctrinal framework under article I, section 1 that diverged from the Federal Substantive Due Process doctrine with respect to other regulation. In 1971, three years after adoption of the Constitution of 1968, Justice Roberts, writing to invalidate a ban on drug store advertising prices as lacking legitimate justification, explicitly rejected emerging federal standards of review.[112] Instead, he read the Pennsylvania constitutional principles to prohibit interferences which were "unreasonable, unduly oppressive or patently beyond the necessities of the case" and to require that "the means which it employs must have a real and substantial relation to the objects sought to be attained."[113] More recently, the Pennsylvania Supreme Court invalidated a lifetime ban on ex-offenders' employment in the nursing home industry as unreasonable and unduly oppressive.[114] The court has reiterated that

and small tracts of farmland); Surrick v. Zoning Hearing Bd., 382 A.2d 105, 111–12 (Pa. 1977) (exclusion of multi-family dwellings); Willistown Township v. Chesterdale Farms, Inc., 341 A.2d 466, 468–69 (Pa. 1975) (exclusionary limitation of apartment construction); Appeal of Girsh, 263 A.2d 395, 397 (Pa. 1970) (exclusionary limitation of apartment construction); Appeal of Kit-Mar Builders, Inc., 268 A.2d 765, 765–66 (Pa. 1970) (two acre minimum), *abrogated by* C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd., 820 A.2d 143 (Pa. 2002); *cf. In re* Realen Valley Forge Greenes Assocs., 838 A.2d 718, 737–38 (Pa. 2003) (Saylor, J., dissenting) (noting the "difficult, but I believe necessary, task of weighing public and private interests necessary under the Due Process Clause, which, despite the United States Supreme Court's approach, remains this Court's preferred method of assessing validity challenges in the land use arena," but expressing concern that "if courts are to maintain legitimacy in the application of substantive due process in considering government regulation, they must begin with a healthy respect for legislative, social policy judgments").

111. *See* Township of Exeter v. Zoning Hearing Bd., 962 A.2d 653, 655 (Pa. 2009) (overturning a zoning ordinance that prohibited signs from exceeding twenty-five square feet); *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d at 721 ("reverse spot zoning"); Mahoney v. Township of Hampton, 651 A.2d 525, 528 (Pa. 1994) (overturning a township ordinance that prohibited private enterprise from operating gas wells in residential districts but permitting public operation of wells as unreasonable); Pa. Nw. Distribs., Inc. v. Zoning Hearing Bd., 584 A.2d 1372, 1378 (Pa. 1991) (overturning a zoning ordinance which amortized an adult book store's pre-existing, lawful, non-conforming use); Council of Middletown Twp. v. Benham, 523 A.2d 311, 317 (Pa. 1987) (finding that, if there is a municipal limitation on non-public sewer systems, it must be reasonable); Beaver Gasoline Co. v. Zoning Hearing Bd., 285 A.2d 501, 505 (Pa. 1971) (overturning a total ban on gas stations if the regulation bears no relationship to the public health, safety, morals, and general welfare).

112. *Pa. State Bd. of Pharmacy*, 272 A.2d at 490–91.

113. *Id.* at 491 (quoting Gambone v. Commonwealth, 101 A.2d 634, 637 (Pa. 1954)). Ironically, the Supreme Court of the United States came to similar conclusions regarding pharmacy advertising five years later under the renovated Commercial Speech doctrine of the First Amendment. *See Va. State Bd. of Pharmacy*, 425 U.S. at 770.

114. Nixon v. Commonwealth, 839 A.2d 277, 288, 290 (Pa. 2003) (violation of article I, section 1 "right to pursue a lawful occupation"); *see also* Sec'y of Revenue v. John's Vending Corp., 309 A.2d 358, 362 (Pa. 1973) ("To interpret Section 403(2) as a blanket prohibition

Pennsylvania's constitutional standards for "reasonable" regulation reach higher than the deeply permissive or nonexistent federal floor,[115] though it continues to extend substantial deference to commercial regulation.[116]

c. *"Defending . . . liberty . . . protecting . . . reputation, and of pursuing their own happiness"*

In the last half century, the Pennsylvania Supreme Court has deployed judicial review to forge lines of substantive protection for non-economic interests under article I, section 1 that reach more broadly than their federal counterparts.

One line has highlighted the distinctive presence in the Pennsylvania Declaration of Rights of the "inherent and indefeasible" interest in "reputation" added by the 1790 revision. Federal due process doctrine does not recognize impingements on reputation as deprivations of

barring anyone who has been convicted of a crime of moral turpitude without regard to the remoteness of those convictions or the individual's subsequent performance would be unreasonable. We cannot assume that the legislature intended such an absurd and harsh result.").

115. *See* Shoul v. Commonwealth, 173 A.3d 669, 677–78 (Pa. 2017) ("This Court, by contrast, applies what we have deemed a 'more restrictive' test. . . . we must assess whether the challenged law has 'a real and substantial relation' to the public interests it seeks to advance, and is neither patently oppressive nor unnecessary to these ends."); *id.* at 681 ("[A]s Chief Justice Castille explained [concurring] in *Nixon*, a law which fails to account for persons' inherent potential for rehabilitation may well be 'unreasonable,' 'unduly oppressive,' or 'patently beyond the necessities of' its regulatory aims." (quoting *Nixon*, 839 A.2d at 287 n.15)). *But cf. id.* at 690–93 (Wecht, J., concurring) ("Oddly enough, as the federal courts evolved toward a 'rational relationship' standard, this Court nonetheless has persisted in employing the language of *Gambone* to superintend legislation . . . . The *Gambone/Nixon* standard validates and encourages judicial overstepping . . . . It is time to cease adherence to the outdated and overbroad language of *Gambone* in applying the rational basis test in Pennsylvania.").

116. *See, e.g.*, *id.* at 672 (majority opinion) (finding lifetime disqualification from commercial driver's license of license holder who retrieved marijuana from a co-worker and delivered it to a state police informant did not violate article I, section 1, but remanding for evaluation under the Cruel Punishment Clause); Driscoll v. Corbett, 69 A.3d 197, 214–15 (Pa. 2013) (upholding mandatory judicial retirement); Khan v. State Bd. of Auctioneer Exam'rs, 842 A.2d 936, 951–52 (Pa. 2004) (affirming reciprocal discipline of auctioneer).

The commonwealth court in recent years has likewise been restrained but not supine. *Compare* E. Coast Vapor v. Pa. Dep't of Revenue, 189 A.3d 504, 520–21 (Pa. Commw. Ct. 2018) (rejecting substantive due process challenge to tax on e-cigarettes), *and* Ladd v. Real Estate Comm'n, 187 A.3d 1070, 1077 (Pa. Commw. Ct. 2018) (rejecting challenge to real estate licensing regime), *with* Megraw v. Sch. Dist. of Cheltenham Twp., No. 577 C.D. 2017, 2018 WL 2012130, at *10 (Pa. Commw. Ct. May 1, 2018) (invalidating ten-year employment disqualification of groundskeeper for providing false information while attempting to purchase a firearm), *and* Peake v. Commonwealth, 132 A.3d 506, 522 (Pa. Commw. Ct. 2015) (invalidating lifetime ban of employment of ex-offenders).

constitutionally protected liberty.[117] By contrast, in the past half century the Pennsylvania Supreme Court has found constitutional violations of the article I, section 1 right of "acquiring, possessing and protecting . . . reputation" when government imposes official stigma[118] and has construed statutes narrowly to avoid undue impingement on interests in reputation.[119]

While the right to informational privacy holds a less than fully secure position in federal due process doctrine,[120] a second robust line of Pennsylvania case law in the last half century reads article I, section 1 in conjunction with the fabric of the Pennsylvania Constitution to establish substantive constitutional protection of informational privacy

117. Paul v. Davis, 424 U.S. 693, 706, 708–09 (1976) (a government act of defamation does not deprive a person "of any 'liberty' protected by the procedural guarantees of the Fourteenth Amendment;" stigma, standing alone, does not "significantly alte[r]" a person's legal status so as to "justif[y] the invocation of procedural safeguards.").

118. *See In re* Fortieth Statewide Investigating Grand Jury, 197 A.3d 712, 715 (Pa. 2018) (ordering redaction of references in grand jury report to priests who had not received opportunity to rebut findings that they were predators because "as with all legal proceedings which affect fundamental individual rights, the judicial branch serves a critical role in guarding against unjustified diminution of due process protections for individuals whose right of reputation might be impugned"); *In re* Fortieth Statewide Investigating Grand Jury, 190 A.3d 560, 573 (Pa. 2018) (emphasis omitted) (ordering temporary redaction of grand jury report: "The Pennsylvania Constitution 'places reputational interests on the highest plane, that is, on the same level as those pertaining to life, liberty, and property'" (emphasis omitted)); *In re* J.B., 107 A.3d 1, 19 (Pa. 2014) (determining that the Sex Offender Registration and Notification Act lifetime registration provision as applied to juvenile offenders is an unconstitutional irrebuttable presumption, highlighting the right to reputation under article 1 section 1); Carlacci v. Mazaleski, 798 A.2d 186, 190 (Pa. 2002) ("[T]here exists a right to petition for expungement of a PFAA record where the petitioner seeks to protect his reputation. This right is an adjunct of due process and Article I, Section 1 of the Pennsylvania Constitution and is not dependent upon express statutory authority."); Wolfe v. Beal, 384 A.2d 1187, 1189 (Pa. 1978) (holding that a person who has been unlawfully committed to a state mental hospital has an article I, section 1 right to the destruction of hospital records, which were created as a result of the illegal commitment).

119. *See* A.Y. v. Commonwealth, 641 A.2d 1148, 1152–53 (Pa. 1994) (requiring more than hearsay evidence to prevent expungement of uncorroborated reports of child abuse); Sprague v. Walter, 543 A.2d 1078, 1084–85 (Pa. 1988) (reading Shield Law privilege narrowly to avoid conflict with article I, section 1); Hatchard v. Westinghouse Broad. Co., 532 A.2d 346, 351 (Pa. 1987) (construing Pennsylvania Shield Law narrowly in light of interest in reputation).

120. *Compare* NASA v. Nelson, 562 U.S. 134, 147 (2011) ("As was our approach in *Whalen,* we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance."), *with id.* at 160 (Scalia, J., concurring in the judgment) ("A federal constitutional right to 'informational privacy' does not exist. . . . I must observe a remarkable and telling fact about this case, unique in my tenure on this Court: Respondents' brief, in arguing that the Federal Government violated the Constitution, does not once identify which provision of the Constitution that might be.").

rights beyond the limits on search and seizure.[121] Under the 1968 Constitution, the Pennsylvania Supreme Court has vindicated the article I right to informational privacy both by invalidating infringing actions[122] and by reading statutes to incorporate appropriately weighty consideration of privacy interests under the Pennsylvania Constitution.[123]

121. *See, e.g.*, Pa. State Educ. Ass'n v. Commonwealth, 148 A.3d 142, 150 (Pa. 2016) ("In identifying rights to informational privacy under the Pennsylvania Constitution, this Court has focused its attention not on the rights of persons accused as set forth in Article 1, section 8, but rather to the broader array of rights granted to citizens under Article 1, Section 1, which is entitled 'Inherent rights of mankind.'"); *In re* "B", 394 A.2d 419, 424–25 (Pa. 1978) ("The parties in this appeal have not cited, and our research has not revealed, any Pennsylvania appellate court decision dealing explicitly with this constitutional right of privacy. . . . the patient's right to prevent disclosure of such information is constitutionally based. This constitutional foundation emanates from the penumbras of the various guarantees of the Bill of Rights as well as from the guarantees of the Constitution of this Commonwealth, see especially, Article I, Section 1 (inherent right to enjoy and defend life and liberty, to protect reputation and pursue happiness[)]; Article I, Section 2 (all political power is inherent in the people[)]; Article I, Sections 3 and 4 (people's right to freedom of religion); Article I, Section 7 (freedom of press and speech guaranteed to every citizen so that they may speak, write, or print freely on any subject . . . .); Article I, Section 8 (people shall be secure in their persons, houses, papers, and possessions from unreasonable search and seizures); Article I, Section 9 (an accused in a criminal proceeding cannot be compelled to give evidence against himself); Article I, Section 11 (courts are to be open to all to provide remedy for injury done to reputation); Article I, Section 20 (right of assembly); Article I, Section 23 (prohibition of the peacetime quartering of troops in any house without the consent of the owner); and Article I, Section 25 (reservation of powers in the people); and Article I, Section 26 (prohibition against the denial by the Commonwealth of the enjoyment of any civil right). In some respects these state constitutional rights parallel those of the Federal Constitution . . . . In other respects our Constitution provides more rigorous and explicit protection for a person's right of privacy." (citations omitted)); *see also* Seth F. Kreimer, *The Right to Privacy in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 77, 83 (1993) ("Pennsylvania's courts have relied on the insights under one constitutional provision to give texture to cognate rights."); *cf.* Movieclips, *The Castle (9/12) Movie Clip–The Vibe of the Thing*, YOUTUBE (Oct. 6, 2011), https://www.youtube.com/watch?v=ssukL9a99JA.

122. Denoncourt v. Commonwealth, 470 A.2d 945, 950 (Pa. 1983) (plurality opinion) (declaring the reporting provisions of the Ethics Act relating to family members unconstitutional "in that they violate the due process rights of the public official and the family's right to privacy under Art. I § 1"); *In re "B"*, 394 A.2d at 425–26 (barring subpoena of disclosure of records of inpatient psychiatric treatment of juvenile's mother); *cf.* Markham v. Wolf, 190 A.3d 1175, 1190 (Pa. 2018) (remanding for determination of whether governor's order accorded sufficient protection to "strong privacy interests protecting home addresses"); Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 117, 117 n.8 (Pa. 1985) ("The court did however affirm Judge MacPhail's conclusion that the rape and incest reporting provisions offended constitutional safeguards, and the Commonwealth was permanently enjoined from enforcing them. . . . We note that the Commonwealth chose not to appeal this aspect of the Commonwealth Court's decision.").

123. *See* Reese v. Pennsylvanians for Union Reform, 173 A.3d 1143, 1159 (Pa. 2017) (reading Right to Know Law ("RTKL") in light of article I to require State Treasurer to balance public access rights against "right to informational privacy"); Pa. State Educ. Ass'n

A third strand of doctrine has vindicated Pennsylvania constitutional limits on the government's authority to infringe on matters of intimacy and bodily integrity, rooted in "inherent and indefeasible rights" more protective than those recognized by the United States Supreme Court under contemporaneous federal law.[124] Strikingly, at a time when the same sex intimacy was entirely bereft of federal protection, a plurality opinion of the Pennsylvania Supreme Court struck down a statute prohibiting "deviate sexual intercourse" as an unconstitutional infringement on liberty.[125] And well before the United States Supreme Court had reversed its refusal to recognize equal rights for same sex couples, the Pennsylvania Supreme Court construed Pennsylvania statutes in the shadow of article I, section 1 to facilitate second parent adoption.[126] In the last decade, the Pennsylvania Supreme Court has not had occasion to forge ahead of the protections increasingly recognized by the federal courts in this area.

v. Commonwealth, 148 A.3d 142, 156 (Pa. 2016) (finding that school employees' home addresses were exempt from disclosure under the RTKL); Tribune-Review Publ'g Co. v. Bodack, 961 A.2d 110, 118 (Pa. 2008) (construing RTKL to protect phone numbers for disclosure); Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n, Local Union No. 12, 713 A.2d 627, 630 (Pa. 1998) (construing RTKL to require redaction of personal information).

124. *See In re* T.R., 731 A.2d 1276, 1281 (Pa. 1999) ("Compelling a psychological examination in [juvenile dependency dispositional review] is nothing more or less than social engineering in derogation of constitutional rights . . . . [W]e find such state intervention frightening in its Orwellian aspect."); John M. v. Paula T., 571 A.2d 1380, 1385, 1388 (Pa. 1990) (refusing to allow court-ordered blood tests); *In re* Baby Girl D., 517 A.2d 925, 927 (Pa. 1986) (construing guardian ad litem's standing to question the propriety of the fees charged for adoption to be grounded in the standing of the infant children themselves because "it is every American's right not to be bought or sold" pursuant to article I, section 1).

125. *Compare* Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003), *with* Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980) (Flaherty, J., writing for himself and Eagan, C.J.) (declaring statute forbidding "deviate sexual intercourse" unconstitutional and arguing that "the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others"). The majority of the Court in *Bonadio* invalidated the statute on equal protection grounds. *Id.* ("Such a purpose [to regulate the private conduct of consenting adults], we believe, exceeds the valid bounds of the police power while infringing the right to equal protection of the laws guaranteed by the Constitution of the United States and of this Commonwealth.").

126. *Compare* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("[The present case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."), *with In re* Adoption of R.B.F., 803 A.2d 1195, 1203 n.14 (Pa. 2002) (construing Adoption Act in light of article I, section 1 to find that the Act allows same-sex second-parent adoptions without legal parent relinquishing parental rights).

2. Protecting Equality Without Equal Protection

The words "equal protection" do not appear in the Pennsylvania Constitution. Rather, equality is addressed by a series of separate textual elements that have accreted over two and a half centuries.

Since 1776, the Pennsylvania Constitution has declared that "all men are born equally free and independent."[127] The 1790 Declaration of Rights mandated "[t]hat elections shall be free and equal."[128] The Constitution of 1874 adopted a prohibition against the adoption of "special law[s]" on twenty-seven specified subjects, and a requirement that "taxes [and duties] shall be uniform . . . and shall be levied and collected under general laws."[129] The participants in the process that generated the Constitution of 1968 considered adopting the "equal protection" language of the Fourteenth Amendment, but that proposal fell by the wayside.[130] The text that emerged broadened the prohibition of "special laws" to apply to all legislation,[131] retained the requirement of uniformity and "general laws" for taxation,[132] and adopted a prohibition of "discriminat[ion] against any person in the exercise of any civil right."[133] In 1971, the Equal Rights Amendment prohibited denial of "[e]quality of rights under the law . . . because of . . . sex."[134]

A long line of discussion in opinions construing the 1968 Constitution asserts that the standards for addressing unequal treatment under the Pennsylvania Constitution mirror those of the Federal Equal Protection Clause.[135] But examining the holdings of Pennsylvania Supreme Court

127. PA. CONST. of 1776, ch. I, § 1; *cf. id.* ch. II, § 18 ("In order that the freemen of this commonwealth may enjoy the benefit of election as equally as may be until the representation shall commence, as directed in the foregoing section, each county at its own choice may be divided into districts, hold elections therein . . . . And no inhabitant of this state shall have more than one annual vote at the general election for representatives in assembly.").

128. PA. CONST. of 1790, art. IX, § 5.

129. PA. CONST. of 1874, art. III, § 7; *id.* art. IX, § 1. *See generally* Appeal of Ayars, 16 A. 356, 363 (Pa. 1889) ("[G]eneral laws . . . apply alike to all that are similarly situated as to their peculiar necessities.").

130. *See supra* text accompanying notes 52–53.

131. PA. CONST. art. III, § 32; *see supra* text accompanying notes 64–66.

132. PA. CONST. art. VIII, § 1.

133. *Id.* art. I, § 26.

134. *Id.* art. I, § 28.

135. The first assertion under the 1968 Constitution appears to be *Baltimore & Ohio Railroad Co. v. Commonwealth, Department of Labor & Industry*, 334 A.2d 636, 643 (Pa. 1975), where Justice Roberts states that "we must also consider appellees' contentions under the Equal Protection Clause of the federal Constitution and article III, section 32 of the Pennsylvania Constitution. These issues may be considered together, for the content of the two provisions is not significantly different." *See also, e.g.*, City of Harrisburg v. Sch. Dist. of Harrisburg, 710 A.2d 49, 52–53 (Pa. 1998) ("We evaluate challenges based on the

cases reveals that the court has independently deployed Pennsylvania equality review on a regular basis beyond the remit of federal equal protection doctrine.[136]

uniformity and equal protection standards in the same manner." (citing Leonard v. Thornburgh, 489 A.2d 1349 (1985))); James v. Se. Pa. Transp. Auth., 477 A.2d 1302, 1305 (Pa. 1984) ("James' challenge . . . is also grounded on the equal protection clause of the Fourteenth Amendment to the United States Constitution and Art. I, § 26 of the Pennsylvania Constitution. . . . The claims made under these separate constitutional provisions are in essence the same."); Commonwealth v. Kramer, 378 A.2d 824, 826 (Pa. 1977) ("[T]he protection afforded by the equal protection clause of the federal constitution and the prohibition against special laws in the Pennsylvania Constitution are substantially the same. The concept of equal protection requires that uniform treatment be given to similarly situated parties.").

For more recent echoes, see, e.g., Erfer v. Commonwealth, 794 A.2d 325, 332 (Pa. 2002) ("[T]o the extent that Petitioners' gerrymandering claim is predicated on the equal protection guarantee contained in Pa. Const. art. 1, §§ 1 and 26, this court has previously determined that this right is coterminous with its federal counterpart. [W]e reject Petitioners' claim that the Pennsylvania Constitution's free and equal elections clause provides further protection to the right to vote than does the Equal Protection Clause." (citation omitted)), *abrogated by* League of Women Voters v. Commonwealth, 178 A.3d 737, 813 (Pa. 2018) ("[W]e reject Justice Mundy's assertion that *Erfer* requires us, under the principles of *stare decisis*, to utilize the same standard to adjudicate a claim of violation of the Free and Equal Elections Clause and the federal Equal Protection Clause"); Kramer v. Workers' Comp. Appeal Bd., 883 A.2d 518, 532 (Pa. 2005) ("In evaluating equal protection claims under the Pennsylvania Constitution, this Court has employed the same standards applicable to federal equal protection claims."); Harrisburg Sch. Dist. v. Zogby, 828 A.2d 1079, 1088 (Pa. 2003) ("[I]t is now generally accepted that the meaning and purpose of the Equal Protection Clause of the United States Constitution, and the state Constitution's prohibition against special laws, are sufficiently similar to warrant like treatment, and that contentions concerning the two provisions may be reviewed simultaneously. In particular, Article III, Section 32 and the Equal Protection Clause both reflect the principle that like persons in like circumstances must be treated similarly." (citations omitted)).

136. For citations, see *infra* App. C.

Table 13: Independent Judicial Review Under Equality Provisions

Tax Uniformity Art. VIII, § 1	**17**
Statute	8
Municipal Action	5
Administrative Action	4
ERA Art. I, § 28	**12**
Statute	8
Judicial Action	4
Equal Treatment Art. III, § 32	**7**
Statute	6
Municipal Action	1
Total	**36**

In each of these areas, the state constitutional text diverges from the federal text, and was adopted in different time periods.[137] And in each of them, the Pennsylvania Supreme Court has in fact exercised judicial review under doctrinal analyses that are quite distinct from federal standards.

a. Tax Uniformity

The independent nature of Pennsylvania review is clearest with respect to the Tax Uniformity Clause. The 1873 Convention adopted the provision to address the "considerable popular anger generated by . . . preferential tax treatment . . . . This anger fueled the clamor for a constitutional convention."[138] Before the 1967 Convention, the provision was deployed to invalidate state taxation regimes that met federal

137. Of course, text and history have not been the sole axes around which federal "equal protection" doctrine spins. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 774–75 (2013) (relying on the "equal protection" component of the 1791 Due Process Clause to invalidate refusal to recognize same sex marriages); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) (racial classification by the federal government held subject to strict scrutiny under the Fifth Amendment, deploying tests developed under Fourteenth Amendment equal protection doctrine notwithstanding the absence of "equal protection" language in the Fifth Amendment Due Process Clause, and its 1791 drafting and ratification by slave-holders).

138. *See* Nextel Commc'ns of the Mid-Atlantic, Inc. v. Commonwealth, 171 A.3d 682, 695 (Pa. 2017) (reviewing historical context of the uniformity clause).

constitutional standards.[139] Both the legislation authorizing and the referendum question convening the Convention of 1967 explicitly insulated the clause from possible revision,[140] notwithstanding the contemporaneous observation that "the uniformity clause of the Pennsylvania Constitution has followed a path through our courts that is easily as unpredictable and winding as Alice's road through Wonderland. No provision in our constitution has been so much litigated yet so little understood."[141]

The current state of doctrine was recently summarized by the opinion of Justice Wecht in *Mount Airy #1, LLC v. Pennsylvania Department of Revenue:*

> In the past, this Court has held that the Equal Protection Clause of the Fourteenth Amendment and the Uniformity Clause of the Pennsylvania Constitution are "largely coterminous" and "are to be analyzed in the same manner." Nevertheless, we have struck down numerous tax statutes that unquestionably would survive the highly deferential rational basis review attendant to a federal Equal Protection challenge. This is so because the two constitutional provisions are only sometimes in alignment.[142]

139. *Compare* Shaffer v. Carter, 252 U.S. 37, 58–59 (1920) (sustaining the constitutionality of a state graduated income tax under federal law), *with* Kelley v. Kalodner, 181 A. 598, 602–03 (Pa. 1935) (invalidating graduated income tax under tax uniformity clause).

140. Amidon v. Kane, 279 A.2d 53, 58 (Pa. 1971); *see* Act of March 15, 1967, No. 2, § 7(b), 1967 Pa. Laws 2, 7.

141. *In re* Lower Merion Township, 233 A.2d 273, 276 (Pa. 1967).

142. 154 A.3d 268, 274 (Pa. 2016) (footnote omitted) (citations omitted); *see also* Valley Forge Towers Apartments N, LP v. Upper Merion Area Sch. Dist., 163 A.3d 962, 967 n.4 (Pa. 2017) ("[T]ax uniformity incorporates equal protection precepts . . . . One difference . . . is that the Uniformity Clause is more restrictive in that it does not allow the government to engage in disparate tax treatment of different sub-classifications of real property, such as residential versus commercial."); *id.* at 973 ("[T]he federal Equal Protection Clause guarantees this level of protection to property owners, and it also sets the constitutional 'floor' for the protection of property owners' rights under the Uniformity Clause."); *Mount Airy #1*, 154 A.3d at 274 ("In order to determine the standards associated with a particular Uniformity Clause challenge, we look to our precedent, as well as the text and history of the clause itself."); Hosp. & Healthsystem Ass'n of Pa. v. Commonwealth, 77 A.3d 587, 606 n.26 (Pa. 2013) ("In some contexts the Uniformity Clause has been recognized as reflecting more stringent limitations. We do not foreclose the possibility that the Uniformity Clause provides greater protections in other ways as well, based on a developed analysis of its text, history, and meaning." (citation omitted)); Downingtown Area Sch. Dist. v. Chester Cty. Bd. of Assessment Appeals, 913 A.2d 194, 200 (Pa. 2006) (explaining that "federal equal protection jurisprudence . . . sets the floor for Pennsylvania's uniformity assessment").

b. Equal Rights Amendment

The first in the nation, Pennsylvania's Equal Rights Amendment—explicitly forbidding denial of equality under the law because of sex—was proposed and ratified by the people of Pennsylvania at a time when federal constitutional constraints on sex discrimination were a gleam in the eye of then-Professor Ruth Bader Ginsburg.[143] While the federal doctrine has obviously evolved substantially in the last half century, it still does not embrace the stark proposition embedded in Pennsylvania constitutional doctrine that "[t]he law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman."[144]

143. The first Supreme Court case invalidating sex discrimination under the equal protection clause, was decided November 22, 1971. Reed v. Reed, 404 U.S. 71, 76–77 (1971). This extension of federal "rational basis" review took place six months after adoption of the Pennsylvania ERA, and two years after the ERA was introduced into the Pennsylvania legislature. PA. CONST. art. I, § 28; *cf.* Hoyt v. Florida, 368 U.S. 57, 61–62 (1961) ("Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civil duty of jury service . . . .").

144. Henderson v. Henderson, 327 A.2d 60, 62 (Pa. 1974) (per curiam) ("The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities."); *see also* Hartford Accident & Indem. Co. v. Ins. Comm'r, 482 A.2d 542, 549 (Pa. 1984) ("The rationale underlying the 'state action' doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law. . . . [I]n light of the Pennsylvania Constitution's clear and unqualified prohibition of discrimination 'under the law' based upon gender, we conclude that the Commissioner's disapproval of Hartford's discriminatory sex-based rates on the ground they were 'unfair' and contrary to established public policy was . . . an appropriate exercise of his statutory authority.").

A generation after *Henderson*, federal doctrine remains considerably less severe in discountenancing sex discrimination. *See* Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 62 (2001) ("[T]he imposition of the requirement for a paternal relationship, but not a maternal one, is justified by two important governmental objectives."); *cf.* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017) ("[A]t least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." (second alteration in original) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996))).

c. Generic Constitutional Equality Analysis

Pennsylvania's generic constitutional equality analysis[145] bears greater similarity to federal doctrine than does doctrine under the Tax Uniformity Clause and Equal Rights Amendment. Opinions of the Pennsylvania Supreme Court regularly repeat versions of the following heuristic for addressing claims of unequal classification:

> The types of classifications are: (1) classifications which implicate a "suspect" class or a fundamental right; (2) classifications implicating an "important" though not fundamental right or a "sensitive" classification; and (3) classifications which involve none of these. Should the statutory classification in question fall into the first category, the statute is strictly [scrutinized for] a "compelling" governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to [require] an "important" governmental purpose; and if the

145. The term "constitutional equality analysis" elides the fact that Pennsylvania courts have variously found the basis for this analysis in: article III, section 32; article I, section 1; and article I, section 26. *Compare* League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 784 (Pa. 2018) (referring to "Article I, Sections 1 and 26 of the Pennsylvania Constitution" as the "Equal Protection Guarantee"), *with* William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 417 n.3 (Pa. 2017) ("Section 32 does not speak expressly in terms of equal protection. Nonetheless, we long have gleaned equal protection principles from Section 32 . . . ."), Robinson Township. v. Commonwealth, 147 A.3d 536, 581 (Pa. 2016) (article III, section 32 "requires consideration of whether 'the challenged legislation promotes a legitimate state interest, and that a classification is reasonable rather than arbitrary and rests upon some ground of difference, which justifies the classification *and* has a fair and substantial relationship to the object of the legislation.'" (emphasis added) (citing Robinson Township v. Commonwealth, 83 A.3d 901, 901 (Pa. 2013))), *and* Zauflik v. Pennsbury Sch. Dist., 104 A.3d 1096, 1117 (Pa. 2014) (referring to "[t]he equal protection provision of the Pennsylvania Constitution (or, more precisely, the non-discrimination provision)" as article I, section 26). *Cf. id.* at 1115 n.9 ("[C]ommon constitutional principle at the heart of the special legislation proscription [of Section 32] and the equal protection clause is that like persons in like circumstances should be treated similarly by the sovereign." (second alteration in original) (citing Pa. Turnpike Comm'n v. Commonwealth, 899 A.2d 1085, 1094 (Pa. 2006))); Kramer v. Workers' Comp. Appeal Bd., 883 A.2d 518, 532 (Pa. 2005) (referring to "Article I, Section 1 of the Pennsylvania Constitution" as the "equally free and independent" clause and as the basis for "equal protection claims under the Pennsylvania Constitution"); Erfer v. Commonwealth, 794 A.2d 325, 355 (Pa. 2002) ("Article I, §§ 1 & 26, together, constitute an equal protection guarantee." (citing Love v. Borough of Stroudsburg, 597 A.2d 1137 (Pa. 1991))), *abrogated by* League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737 (Pa. 2018); DeFazio v. Civil Serv. Comm'n, 756 A.2d 1103, 1105 (Pa. 2000) ("In Pennsylvania, constitutional equal protection is grounded in the following language: 'The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law . . . .'" (citing PA. CONST. art. 3 § 32)).

> statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification.[146]

This tracks a number of elements of federal equal protection analysis; but similarity is not identity.[147] Three differences are particularly salient.

First, an interest may be "fundamental" for purposes of Pennsylvania analysis, though not of federal analysis.[148] Second, while the origin of the Pennsylvania reference to "important though not fundamental" rights lies in federal case law from the early 1970s, the United States Supreme Court has largely abandoned the category of "important" interests in equal protection doctrine.[149] By contrast, the Pennsylvania Supreme

146. *Zauflik*, 104 A.3d at 1118 (citing Smith v. City of Philadelphia, 516 A.2d 306, 311 (Pa. 1986); *see, e.g.*, William Penn Sch. Dist., 170 A.3d at 458 ("Under a typical [equal protection] analysis of governmental classifications, there are three different types of classifications calling for three different standards of judicial review." (alteration in original) (quoting James v. Se. Pa. Transp. Auth., 477 A.2d 1302, 1305–06 (Pa. 1984))); Probst v. Commonwealth., 849 A.2d 1135, 1143–44 (Pa. 2004); Commonwealth v. Albert, 758 A.2d 1149, 1152 (Pa. 2000); Curtis v. Kline, 666 A.2d 265, 268 (Pa. 1995); *Smith*, 516 A.2d at 311.

147. *Cf. League of Women Voters of Pa.*, 178 A.3d at 784 n.54 ("[W]e merely remarked that the Equal Protection Guarantee and Equal Protection Clause involve the same jurisprudential framework — *i.e.*, a means-ends test taking into account a law's use of suspect classification, burdening of fundamental rights, and its justification in light of its objectives.").

148. *See, e.g.*, William Penn Sch. Dist., 170 A.3d at 461 ("This leaves the question of what sort of right is at issue. In turn, this will dictate what standard of review applies to Petitioners' equal protection claim, should it proceed. We need not resolve that question presently, but we underscore that whether education is a fundamental right under Pennsylvania law is not a settled question . . . .").

149. *See* James v. Se. Pa. Transp. Auth., 477 A.2d 1302, 1306, (Pa. 1984) ("[I]n the third type of cases, if 'important,' though not fundamental rights are affected by the classification, or if 'sensitive' classifications have been made, the United States Supreme Court has employed what may be called an intermediate standard of review, or a heightened standard of review." (quoting U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 518 (1973) (Marshall, J., concurring))).

Justice Marshall's focus on "important" rights was hotly contested in 1973, and had gone into eclipse in federal doctrine by the end of the 1980s. *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 468 (1988) (Marshall, J., dissenting) ("[T]he Court should focus on 'the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.'" (quoting Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting))); *cf.* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176 n.10 (1980) ("Justice Brennan's dissent cite[s] a number of equal protection cases including . . . F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) . . . U.S. Dept. of Agriculture v. Murry, 413 U.S. 508 (1973) . . . and James v. Strange, 407 U.S. 128 (1972). The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles. And realistically speaking, we can be no more certain that this opinion will remain undisturbed than were those who joined the opinion in *Lindsley*, *Royster Guano Co.*, or any of the other cases referred to in this opinion and in the dissenting opinion. But . . . we have no hesitation in asserting, contrary to the

Court continues to identify "important" interests that trigger "intermediate" scrutiny for equal protection purposes.[150] And Pennsylvania doctrine does not seem to have assimilated the concern for "animus" that loomed large in Justice Kennedy's equal protection jurisprudence.[151]

Third, and most broadly important, the "rational basis" test which has evolved in federal doctrine in the last half century upholds distinctions when any reasonably conceivable state of facts could support a post hoc rationalization connecting the distinction to some legitimate public purpose.[152] In applying Pennsylvania's constitutional equality

dissent, that where social or economic regulations are involved together with this case, state the proper application of the test. The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational-basis standard, and about which cases limit earlier cases, are just that: comments in a dissenting opinion." (citations omitted)).

150. *See Zauflik*, 104 A.3d at 1119–20 ("Without revisiting the disagreement between the *Smith* Court plurality and concurrence concerning whether rational basis review or intermediate scrutiny is the more appropriate approach to a claim [regarding distinctions in the availability of remedies], we have little difficulty in rejecting the notion that we should engage in strict scrutiny; and, consistently with *James*, which represented a majority view, we will employ intermediate scrutiny." (emphasis omitted)).

151. *E.g.*, United States v. Windsor, 570 U.S. 744, 770, 775 (2013) (invalidating statutory refusal to recognize sex marriages due to improper animus: "The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973))); Romer v. Evans, 517 U.S. 620, 635–36 (1996). With Justice Kennedy's departure from the Court, the federal role of "animus" may wane.

152. One competing line of federal equal protection cases reaching back to *F. S. Royster Guano Co.*, 253 U.S. at 415, which required "a fair and substantial relation" between classification and legitimate state goals, rather than raw speculation, and conceivable relation. But the tipping point for federal doctrine came with *Fritz*, 449 U. S. at 175, rejecting *F.S. Royster*'s requirement that statute "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *See id.* at 179 ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end.").

Since *Fritz*, the lowest level of federal rational basis scrutiny can be met by virtually any speculation that can be argued to have a potential correspondence with reality. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.") There is such a plausible reason, "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 313; Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 320 (1993) (quoting *Beach*, 508 U.S. at 313); Cent. State Univ. v. AAUP, 526 U.S. 124, 131 n.1 (1999) (quoting the lower court opinion that there was "not a shred of evidence in the entire record"); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (quoting *Heller*, 509 U.S. at 320); Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 107–08 (2003) ("Iowa Supreme Court found that the 20 percent/36 percent tax rate differential . . . 'frustrated' what it saw as the law's basic objective, namely, rescuing the racetracks from economic distress. And no rational person, it believed, could claim the contrary." (citation omitted)); Armour v. City of Indianapolis, 566 U.S. 673, 681 (2012); Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) ("[We] will uphold

protection, the Supreme Court of Pennsylvania disavows the authority to second guess the wisdom of legislative policy choices. But under the 1968 Constitution, the Pennsylvania Supreme Court continues to invalidate arbitrary and oppressive statutory classifications which lack a "fair and substantial" relation to the statutory purpose rooted in real distinctions.[153] The Pennsylvania Supreme Court addressed the difference between state and federal standards in the course of invalidating the distinctions drawn by Sunday closing laws in *Kroger Co. v. O'Hara Township*:

> While there may be a correspondence in meaning and purpose between the two, the language of the Pennsylvania Constitution is substantially different from the federal constitution. We are not free to treat that language as though it was not there.
>
> . . . .
>
> In Article III, Section 32, of the Pennsylvania Constitution we find eight areas Explicitly [sic] mentioned as areas which are not

the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds. . . . [T]he Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny.").

153. Commonwealth v. Bonadio, 415 A.2d 47, 51–52 (Pa. 1980); Moyer v. Phillips, 341 A.2d 441, 443–45 (Pa. 1975); *In re* Estate of Cavill, 329 A.2d 503, 506 (Pa. 1974); *see also* Robinson Township v. Commonwealth, 147 A.3d 536, 576 (Pa. 2016) ("Commonwealth has not identified any difference between the oil and gas industry and the myriad of other industries operating within our Commonwealth, many of which use chemicals in their manufacturing processes, which justify these heavy constraints on health professionals' access to, and ability to use or further disclose, this type of information while carrying out the vital responsibilities of their vocation, and we cannot reasonably hypothesize any such justification."); *id.* at 582 ("[R]equirement that only public water facilities must be informed in the event of a spill is unsupportable under Article III, Section 32 of our Constitution."); Pa. Tpk. Comm'n v. Commonwealth, 899 A.2d 1085, 1096, (Pa. 2006) ("[T]here is no rational reason to treat first-level supervisors of the Commission differently than all other first-level supervisors of other public employers when it comes to collective bargaining."); Harrisburg Sch. Dist. v. Hickok, 761 A.2d 1132, 1136 (Pa. 2000) (invalidating distinction singling out Harrisburg, noting that "the judicial function, then, with respect to classifications, is to see that the classification at issue is founded on real distinctions in the subjects classified and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition" (internal quotation marks omitted)); DeFazio v. Civil Serv. Comm'n of Allegheny Cty., 756 A.2d 1103, 1106, (Pa. 2000); Curtis v. Kline, 666 A.2d 265, 268 (Pa. 1995); Ridley Arms, Inc. v. Township of Ridley, 531 A.2d 414, 417 (Pa. 1987) ("[T]he payment of approximately $58,000 to government for the performance of services which can be, and actually were provided by the private sector for approximately $23,000, less than half the amount charged by government, is not 'reasonable.'"); Snider v. Thornburgh, 436 A.2d 593, 597 (Pa. 1981) ("[T]he mistaken assumption that the phrase 'rational basis' implies a greater assumption of constitutionality or connotes a less strict standard of review than the phrase 'fair and substantial relation', should be discarded.").

> to be encumbered by special laws treating certain citizens differently than others. . . . We therefore find that it is our judicial duty to carefully examine any law regulating trade.
>
> . . . .
>
> "Fair and substantial" means that the classification must be reasonable and not arbitrary, and the classification must rest upon some ground of difference which has a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike.
>
> . . . There is no fair and substantial relationship between the objective of providing a uniform day of rest and recreation and in permitting the sale of novelties but not Bibles and bathing suits; in permitting the sale of fresh meat patties but not frozen meat patties; or in permitting the installation of an electric meter but not a T.V. antenna.[154]

The Pennsylvania court recently reiterated in *William Penn School District v. Pennsylvania Department of Education*, that to be rational for purposes of Pennsylvania's constitutional equality analysis, "a classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation."[155]

C. Disanalogous/Skew Provisions

Provisions that lack a federal analog accounted for a quarter (93/373, 25%) of the cases exercising judicial review under the 1968 Constitution over the last fifty years and over a third (91/253, 36%) of cases which find violations of state but not federal constitutional provisions. They make up 41% (57/138) of the cases exercising judicial review with respect to statutes, comparable to the incidence of cases invoking congruent provisions (39%).

The Pennsylvania Supreme Court's rate of review under these provisions increased from under one case per year in the first decade of

154. 392 A.2d 266, 274–75 (Pa. 1978) (citations omitted).

155. 170 A.3d 414, 458 (Pa. 2017); *see id.* at 458 n.64 ("[T]his 'reasonable relationship' terminology closely tracks that of the 'reasonable relation' test invoked, if opaquely employed, by this Court in the *Teachers' Tenure Act Case*, *Danson*, and *Marrero II*."). For a discussion of the "fair and substantial" requirement adopted in *Shoul* and *Nixon*, see *supra* notes 114–15.

the 1968 Constitution to almost two cases per year in the second, third, and fourth decades, and again to 2.5 cases per year in the latest decade.

The rate of review of statutes under disanalogous provisions, doubled from five cases during the decade 1968–1977 (.5 per year) to twelve per decade during the second and third decades, and fourteen per year in the fourth and fifth decades.

Table 14: Judicial Review Under Skew Provisions

	1968–1977	**1978–1987**	**1988–1997**	**1998–2007**	**2008–2018**	**Total**
Judicial Autonomy and Administration	4	9	9	9	7	38
Limits on Municipal Action	1	3	3	3	2	12
Non-Delegation	2		2	3	2	9
Remedies Art. I, § 11		5	3	1		9
Limits on Legislative Process	2	1	1	3	1	8
Single-Subject Rule				2	4	6
[leg. limits + single-subject]	2	1	1	5	5	14
Limits on Executive Action				1	3	4
Elections Art. I, § 5					3	3
Environmental Art. I, § 27		1			2	3
Criminal Process						
Education Art. III, § 14					1	1
Total	**9**	**19**	**18**	**22**	**25**	**93**

Table 15: Judicial Review by Skew Provision

Judicial Autonomy and Administration	**38**
Art. V, § 10	18
Art. V, § 18	4
Art. V, § 16	3
Art. V, § 1	3
Art. V, § 13	3
Art. V, § 9	2
Separation of Powers	2
Art. V, § 12	1
Art. IV, § 9	1
Art. V, § 5	1
Limits on Municipal Action	**12**
Art. III, § 27	4
Art. IX, § 2	3
Art. VI, § 7	2
Separation of Powers	1
Art. III, § 14	1
Art. IX, § 10	1
Non-Delegation	**9**
Art. II, § 1	8
Art. VI, § 7	1
Remedies Art. I, § 11	**9**
Limits on Legislative Process	**8**
Art. III, § 9	2
Art. IV, § 8	1
Separation of Powers	1
Art. VI, § 7	1
Art. III, § 11	1
Art. II, § 2	1
Art. II, § 15	1
Single-Subject Rule	**6**
Art. III, § 3	5
Art. XI, § 1	1
Limits on Executive Action	**4**

Art. VI, § 1	1
Art. IV, § 16	1
Art. II, § 2	1
Art. IV, § 15	1
Elections	**3**
Art. I, § 5	2
Art. II, § 17	1
Environmental Art. I, § 27	**3**
Education Art. III, § 14	**1**
Total	**93**

Table 16: Finding State but No Federal Violation Under Skew Provisions

Judicial Autonomy and Administration	38
Limits on Municipal Action	12
Non-Delegation	9
Limits on Legislative Process	8
Remedies Art. I, § 11	7
Single-Subject Rule	6
Limits on Executive Action	4
Elections Art. I, § 5	3
Environmental Art. I, § 27	3
Education Art. III, § 14	1
Total	**91**

Table 17: Statutory Review Under Skew Provisions

	Total	1968–1977	1978–1987	1988–1997	1998–2007	2008–2018
Judicial Autonomy and Administration	**23**	2	7	6	6	2
Non-Delegation	**9**	2		2	3	2
Remedies Art. I, § 11	**6**		2	3	1	
Limits on Legislative Process	**6**	1	1	1	2	1
Single-Subject Rule	**5**				1	4
[Legis. Proc. Plus Single Subject]	**[11]**	[1]	[1]	[1]	[3]	[5]
Elections Art. I, § 5	**3**					3
Limits on Municipal Action	**2**		1		1	
Environmental Art. I, § 27	**2**		1			1
Education Art. III, § 14	**1**					1
Total	**57**	5	12	12	14	14

1. Judicial Autonomy

The most numerous class of cases raised under skew provisions, both in total (38) and in statutory review (23), involves constitutional claims to judicial autonomy, set forth at Tables 16 and 17 above.

A concern with legislative interventions abridging judicial autonomy is not new in Pennsylvania constitutional doctrine.[156] But the

156. *See, e.g.*, McCabe v. Emerson, 18 Pa. 111, 112–13 (1851) (holding statute overturning final judgment for plaintiff unconstitutional as inconsistent with constitutional scheme); Commonwealth *ex rel.* Johnson v. Halloway, 42 Pa. 446, 448–49 (1862) (invalidating legislation reducing prisoner's sentence); *In re* Investigation by Dauphin Cty. Grand Jury, Sept., 1938, 2 A.2d 804, 809(Pa. 1938) (statute suspending grand jury investigation pending impeachment held unconstitutional). The court in *Leahey v. Farrell* expressed constitutional concerns regarding legislative interference with the judiciary:

> The legislature cannot, by an act of assembly, overrule a judicial decision, it may not direct a statute to be construed in a certain way, it cannot grant a new trial, or order an illegitimate child to be regarded as legitimate under terms of prior deed, it may not change the effect of judgments or decrees previously rendered . . . . . .

wholesale restructuring of Pennsylvania's judicial system into a unified judiciary—by the Constitution of 1968 article V, section 1, combined with the wording of article V, section 10, vesting the supreme court "general supervisory and administrative authority over all the courts"—laid the groundwork for a particularly aggressive assertion of judicial primacy, beginning in 1978 with the sua sponte prospective announcement that application of the Public Agency Open Meeting Law to the supreme court was unconstitutional.[157] This set of constitutional interventions peaked during the decades between 1978 and 2007, with six cases of statutory review in each decade. The last ten years, by contrast, contain only two statutory cases, and none in the last four years. The reduction could either be tied to the Pennsylvania Legislature coming to terms with the judicial declaration of institutional independence or by the Pennsylvania Supreme Court's conclusion that legislative confrontation is not without costs.[158]

2. Due Process of Lawmaking

The second most numerous class of cases invoking disanalogous provisions involves judicial policing of constitutional constraints on

> . . . Should the legislature, or the county salary board, act arbitrarily or capriciously and fail or neglect to provide a sufficient number of court employes [sic] or for the payment of adequate salaries to them, whereby the efficient administration of justice is impaired or destroyed, the court possesses the inherent power to supply the deficiency. Should such officials neglect or refuse to comply with the reasonable requirements of the court they may be required to do so by mandamus.

66 A.2d 577, 579–80 (Pa. 1949) (citations omitted).

157. *In re* 42 Pa. C.S. § 1703, 394 A.2d 444, 452 (Pa. 1978). Even commentators critical of the extent of judicial declarations of primacy under the Constitution of 1968 acknowledge that some warrant for it can be found in the "history underlying the adoption of Section 10." Charles Gardner Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 TEMP. L. REV. 1041, 1057–63 (1995).

158. *Compare* Cty. of Allegheny v. Commonwealth, 534 A.2d 760, 763, 765 (Pa. 1987), *enforcement denied sub nom.*, County of Allegheny v. Commonwealth, 626 A.2d 492 (Pa. 1993) (statutory scheme obligating county to fund courts within its judicial system violated mandate for unified judicial system under Pennsylvania Constitution article V, section 1), *and* Pa. State Ass'n. of Cty. Comm'rs v. Commonwealth, 681 A.2d 699, 701, 703 (Pa. 1996) (granting petition for mandamus and order that the General Assembly enact a funding scheme for the court system pursuant to article V, section 1), *with* Pa. State Ass'n of Cty. Comm'rs v. Commonwealth, 52 A.3d 1213, 1232–33 (Pa. 2012) (declining to issue enforcement orders, and instead reasoning that "we believe that the better course is for further enhancements of the unified judicial system to be a product of inter-branch cooperation. . . . [W]e are encouraged that the changes implemented as a result of the 1997 Interim Report have served as a foundation for further evolution toward a better, administratively unified judicial system.").

legislative process (fourteen cases total, eleven involving statutory review).[159]

Most of these provisions have their origin in the distrust of the legislature that characterized the convention of 1873.[160] But within years of their enactment, the Pennsylvania Supreme Court took a posture of abstention as "essential to the peace and order of the state"; the "enrolled bill" doctrine prevented courts from looking behind the face of a final bill to determine the constitutional propriety of its passage.[161] And with respect to the "single subject" requirement of article III, section 3, which could be raised by examining the face of the bill, by the middle of the twentieth century, the Pennsylvania Supreme Court came to apply "almost an irrebuttable presumption of constitutionality."[162]

The Supreme Court of Pennsylvania abandoned the enrolled bill doctrine in 1986 as inconsistent with the proper understanding of the mandates of the 1873 Convention and the proper role of the court.[163] And

159. *See supra* Tables 14, 17.

160. *See* Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 394 (Pa. 2005) ("[W]hile these changes to the Constitution originated during a unique time of fear of tyrannical corporate power and legislative corruption, these mandates retain their value even today by placing certain constitutional limitations on the legislative process."); *cf.* City of Philadelphia v. Commonwealth, 838 A.2d 566, 586 (Pa. 2003) ("Although Section 3's single-subject and clear-expression requirements were originally added to the Constitution by amendment in 1864, their inclusion in the 1874 Constitution was consistent with the electorate's overall goal of curtailing legislative practices that it viewed with suspicion." (citation omitted)).

161. *See* Kilgore v. Magee, 85 Pa. 401, 412 (1877) (per curiam) ("[W]hen a law has been passed and approved and certified in due form, it is no part of the duty of the judiciary to go behind the law as duly certified to inquire into the observance of form in its passage. . . .The presumption in favor of regularity is essential to the peace and order of the state."); Mikell v. Sch. Dist. of Phila., 58 A.2d 339, 346 (Pa. 1948) ("[T]he enrolled bill is the conclusive evidence of statutory enactment and no other evidence is admissible to establish that the bill was not lawfully enacted . . . ." (citation omitted)); *see* David B. Snyder, *The Rise and Fall of the Enrolled Bill Doctrine in Pennsylvania*, 60 TEMP. L. Q. 315, 321 (1987).

162. Williams, *State Constitutional Limits on Legislative Procedure*, *supra* note 33 at 810; *see City of Philadelphia*, 838 A.2d at 587 ("In the early part of the Twentieth Century, this Court applied the 'germaneness' test in a fairly strict manner. . . . In more recent decisions, however . . . Pennsylvania courts have become extremely deferential toward the General Assembly in Section III challenges."); *Pennsylvanians Against Gambling Expansion Fund, Inc.*, 877 A.2d at 400 ("[I]t is plain that the Court's interpretation of Article III, Section 3 has fluctuated over time.").

163. *See* Consumer Party of Pa. v. Commonwealth, 507 A.2d 323, 332, 334 (Pa. 1986), *abrogated by*, *Pennsylvanians Against Gambling Expansion Fund, Inc.*, 877 A.2d 383 (Pa. 2005) ("[T]he people speaking through their Constitution have mandated a procedure to provide each legislator the opportunity to properly perform that obligation. That directive is mandatory and not precatory and the judicial branch cannot ignore a clear violation because of a false sense of deference to the prerogatives of a sister branch of government. . . . However, for the reasons that follow, we find that Article III, section 1 has not been violated in this instance."). For cases invalidating legislation under procedural

in the twenty-first century—recapturing the distrust of the legislature surrounding the 1873 Convention[164]—the court has invalidated legislation repeatedly for failure to comply with the single subject rule.[165]

3. Skew Provisions and Public Impact

Cases construing disanalogous constitutional provisions originating over two centuries of constitutional development account for many of the highest profile and highest impact exercises of judicial review under the Constitution of 1968.

The Supreme Court of Pennsylvania's recent, controversial, and consequential invalidation of extravagantly gerrymandered congressional districts and consequent reapportionment in *League of Women Voters of Pennsylvania v. Commonwealth* rested on the 1790 guarantee in article I, section 5 of "free and equal elections."[166] Its determination preventing the implementation of restrictive voter identification requirements was grounded in the 1874 mandate of article I, section 5 that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[167] The justification for opening review of Pennsylvania's system of unequal education funding relied on the 1874 command of article III, section 14 to ensure a "thorough and efficient education," as modified in 1967.[168] Review of the

limits not manifest on the face of the bill, see Washington v. Dep't of Pub. Welfare of Commonwealth, 188 A.3d 1135, 1152–54 (Pa. 2018), and cases cited *infra* App. C.

164. *See Washington*, 188 A.3d at 1145, 1147 (reviewing history and noting that "the people lost confidence in the legislature's ability to fulfill its most paramount constitutional duty of representing their interests. . . . [C]onsistent with the intent of the electorate who ratified the 1874 Constitution, the overarching purpose of these and the other restrictions on the legislative process contained in Article III was to furnish essential constitutional safeguards").

165. Commonwealth v. Derhammer, 173 A.3d 723, 725, 730–31 (Pa. 2017); Leach v. Commonwealth, 141 A.3d 426, 435 (Pa. 2016); Commonwealth v. Neiman, 84 A.3d 603, 615–16 (Pa. 2013); Pa. State Ass'n of Jury Comm'rs v. Commonwealth, 64 A.3d 611, 619 (Pa. 2013); *Pennsylvanians Against Gambling Expansion Fund, Inc.*, 877 A.2d at 394, 419; *City of Philadelphia*, 838 A.2d at 592–94 (Pa. 2003).

166. 178 A.3d 737, 802 (Pa. 2018) ("[T]he Free and Equal Elections Clause has no federal counterpart.").

167. Applewhite v. Commonwealth, 54 A.3d 1, 3 (Pa. 2012) (per curiam); *see* Applewhite v. Commonwealth, 2014 Pa. Commw. Unpub. LEXIS 756, at 74–76 (Pa. Commw. Ct. Jan. 17, 2014) (granting final injunction on remand); Applewhite v. Commonwealth, 2012 Pa. Commw. Unpub. LEXIS 749, at *20 (Pa. Commw. Ct. Oct. 2, 2012) (granting preliminary injunction on remand); *see also* Holt v. 2011 Legislative Reapportionment Comm'n, 38 A.3d 711, 718 (Pa. 2012) (finding that the reapportionment plan "considered as a whole, contains numerous political subdivision splits that are not absolutely necessary, and the Plan thus violates the constitutional command to respect the integrity of political subdivisions" as required by article II, section 16 of the Pennsylvania Constitution).

168. William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 425, 441 (Pa. 2017).

complex statutes facilitating fracking construed Pennsylvania's 1971 Environmental Rights Amendment, article I, section 27.[169] The Pennsylvania Supreme Court has relied on provisions that "lack[] a counterpart in the U.S. Constitution" to limit the unilateral authority of the Governor,[170] and on the distinctive provisions for removal of civil officers in article VI, section 7 to invalidate a hotly contested mayoral recall.[171] It has grounded sweeping orders requiring funding of the "unified judicial system" on 1968 provisions that are not mirrored by the federal structure.[172] And—just beyond the scope of the fifty-year time frame—the court recently invalidated a statute that "made sweeping changes to the administration of the state's human services programs" based on a failure to comply with the 1874 legislative procedure mandates of article III, section 4.[173]

169. *See* Robinson Township v. Commonwealth, 83 A.3d 901, 944 (Pa. 2013) ("The Environmental Rights Amendment has no counterpart in the federal charter . . . ." (citations omitted)); Pa. Envtl. Def. Found. v. Commonwealth, 161 A.3d 911, 916, 937, 939 (Pa. 2017) (holding that the diversion of proceeds from oil and gas development to a non-trust purpose violates the Environmental Rights Amendment).

170. *See* Jubelirer v. Rendell, 953 A.2d 514, 524, 533, 537–38, (Pa. 2008) (line item veto); Arneson v. Wolf, 124 A.3d 1225, 1227–28 (Pa. 2015) (construing removal authority under article VI, sections 1, 7); *cf.* Scarnati v. Wolf, 173 A.3d 1110, 1136 (Pa. 2017) (invalidating line item veto).

171. *See* Citizens Comm. to Recall Rizzo v. Bd. of Elections of City & Cty. of Phila., 367 A.2d 232, 246–47, 248–49, 254 (Pa. 1976) (holding, in separate opinions, that recall provisions of the Philadelphia home rule charter were unconstitutional under article VI, section 7).

172. *See* Pa. State Ass'n of Cty. Comm'rs v. Commonwealth, 681 A.2d 699, 701, 703–04 (Flaherty, J., writing for the majority & Newman, J., concurring) (Pa. 1996) (granting petition for mandamus and order that the General Assembly enact a funding scheme for the court system pursuant to article V, section 1); County of Allegheny v. Commonwealth, 534 A.2d 760, 763, 765 (Pa. 1987) (statutory scheme obligating county to fund courts within its judicial system violated mandate for unified judicial system under article V, section 1). This was not one of the court's most rapidly successful initiatives; *cf.* Pa. State Ass'n of Cty. Comm'rs v. Commonwealth, 52 A.3d 1213, 1233 (Pa. 2012) (reviewing two decades of litigation to hold that "we will not grant further mandamus relief; and neither are we inclined to go backward and overrule our prior decisions, rendered in light of the realities of that time. We are optimistic that recent progress on budgetary questions will continue").

173. Washington v. Dep't of Pub. Welfare of Pa., 188 A.3d 1135, 1139 (Pa. 2018); *see* Commonwealth v. Derhammer, 173 A.3d 723, 725, 730–31 (Pa. 2017) (declaring Megan's Law amendment unconstitutional under Pennsylvania Constitution, article III, section3); Commonwealth v. Neiman, 84 A.3d 603, 616 (Pa. 2013) (same); Leach v. Commonwealth, 141 A.3d 426, 427–28, 435 (Pa. 2016) (holding municipal firearm legislation ban violated article III, section 3); Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 390, 396 (Pa. 2005) (declaring provisions of the Gaming Act violated article III, section 3).

IV. STILL LIVING AFTER FIFTY YEARS

In high profile cases exercising judicial review under disanalogous provisions of the Constitution of 1968, the Pennsylvania court has engaged in extensive analyses of the text, history, policy, case law, traditions, and values associated with the provisions in question. And it has regularly been willing to revisit matters that had previously been settled. Thus, in construing the Free and Equal Elections Clause of the Pennsylvania Constitution, *League of Women Voters of Pennsylvania v. Commonwealth* rejected prior precedent declaring partisan gerrymandering non-justiciable.[174] In *William Penn School District v. Pennsylvania Department of Education*, it revisited and reversed precedent precluding judicial enforcement of the Education Clause.[175] In *Robinson Township v. Commonwealth*[176] and *Pennsylvania Environmental Defense Foundation v. Commonwealth*,[177] the court invalidated statutes under the Environmental Rights Amendment,

174. 178 A.3d 737, 813 (Pa. 2018) ("To the extent that *Erfer* can be read for that proposition, we expressly disavow it, and presently reaffirm that, in accord with *Shankey* and the particular history of the Free and Equal Elections Clause, recounted above, the two distinct claims remain subject to entirely separate jurisprudential consideration." (emphasis omitted)); *cf.* Holt v. 2011 Legislative Reapportionment Comm'n, 38 A.3d 711, 758–59 (Pa. 2012) (per curiam) ("[Technological] development suggests that this Court's early establishment of the primacy of equalization of population in formulating redistricting plans . . . may warrant reconsideration. . . . [O]ur own review of our governing precedent in deciding these appeals has led us to conclude that it should be recalibrated . . . . Our prior precedent sounds in constitutional law; to the extent it is erroneous or unclear, or falls in tension with intervening developments, this Court has primary responsibility to address the circumstance.").

175. 170 A.3d 414, 456–57 (Pa. 2017) ("To the extent that our prior cases have suggested, if murkily, that a court cannot devise a judicially discoverable and manageable standard for Education Clause compliance that does not entail making a policy determination inappropriate for judicial discretion, or that we may only deploy a rubber stamp in a hollow mockery of judicial review, we underscore that we are not bound to follow precedent when it cannot bear scrutiny, either on its own terms or in light of subsequent developments. . . . We find irreconcilable deficiencies in the rigor, clarity, and consistency of the line of cases that culminated in *Marrero II*.").

176. 83 A.3d 901, 946 (Pa. 2013) (plurality opinion) ("[I]n circumstances where prior decisional law has obscured the manifest intent of a constitutional provision as expressed in its plain language, engagement and adjustment of precedent as a prudential matter is fairly implicated and salutary."); *Holt*, 38 A.3d at 759 n.38 ("Our charter . . . is not easily amended and any errant interpretation is not freely subject to correction by any co-equal branch of our government, other than this Court. For this reason, we are not constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven to be unworkable or badly reasoned." (citation omitted)).

177. 161 A.3d 911, 937 (Pa. 2017).

notwithstanding precedent dating from shortly after its adoption to the effect that the amendment was non-self-executing.[178]

The Pennsylvania Supreme Court has similarly been willing to revisit and revise prior doctrine under both parallel provisions[179] and congruent provisions.[180]

178. *Compare* Commonwealth *ex rel.* Shapp v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 594–95 (Pa. 1973), *with Pa. Envtl. Def. Found.*, 161 A.3d at 936 n.28 ("As noted in *Robinson Township*, this Court previously misstated that a plurality of the justices in *Gettysburg* concluded that the Section 27 was not self-executing in *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, when in fact only two justices specifically found it to require legislative action." (citations omitted)); *id.* at 937 ("[W]e re-affirm our prior pronouncements that the public trust provisions of Section 27 are self-executing.").

179. *Compare, e.g.*, Commonwealth v. Edmunds, 586 A.2d 887, 898 (Pa. 1991) (rejecting federally crafted good faith exception to exclusionary rule under article I, section 8 and remarking that, "[f]rom *DeJohn* forward, a steady line of case-law has evolved under the Pennsylvania Constitution, making clear that Article I, Section 8 is unshakably linked to a right of privacy in this Commonwealth"), *with* Commonwealth v. Russo, 934 A.2d 1199, 1207 (Pa. 2007) ("[Before 1961] this Court's historical interpretation of Article I, Section 8 always followed 'the fundamental principle of the common law that the admissibility of evidence is not affected by the illegality of the means by which it was obtained.'" (quoting Commonwealth v. Chaitt, 112 A.2d 379, 381(Pa. 1955))).

180. The process started with respect to protection of free expression as the 1968 Constitution was being beginning to be framed, as reflected in Justice Eagen's dissenting opinion in *William Goldman Theatres, Inc. v. Dana*:

> The majority opinion reasons that even though prior restraint, in exceptional cases, do not violate the First and Fourteenth Amendments of the United States Constitution, it does violate Article I, Section 7, of the Pennsylvania Constitution. In order to reach this conclusion, the Majority does a little selective picking from both Constitutions. They go first to the First and Fourteenth Amendments of the United States Constitution in order to bring motion pictures into the ambit of the constitutional guarantee of free speech and free press and imply, therefore, that Article I, Section 7, also covers motion pictures. But, they then reject the First and Fourteenth Amendments and one hundred seventy-one years of Pennsylvania law and state that the Pennsylvania Constitution is different from the United States Constitution, and that the Pennsylvania Constitution prohibits all prior restraints—no matter how unlawful the publication may be, which, as pointed out before, is directly contrary to the United States Constitution.

173 A.2d 59, 71–72 (Pa. 1961) (Eagen, J., dissenting) (emphasis omitted) (citation omitted).

Modern protection under article I, section 7, reaches considerably beyond the shelter provided by the provision in the era of its framing. *Compare* Pap's A.M. v. City of Erie, 812 A.2d 591, 594, 612 (Pa. 2002) (protecting the right of women to engage in erotic dance without wearing pasties), *with* Respublica v. Dennie, 4 Yeates 267, 271 (Pa. 1805) ("[I]f the consciences of the jury shall be clearly satisfied that the publication was seditiously, maliciously, and wilfully aimed at the independence of the United States, the constitution thereof, or of this state, they should convict the defendant." (emphasis omitted)), *and* Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 409 (Pa. 1824) ("[F]rom a regard to decency and the good order of society, profane swearing, breach of the Sabbath, and blasphemy, are punishable by civil magistrates, these are not punished as sins or offences against God, but crimes injurious to, and having a malignant influence on society."). *Cf. Pap's A.M.*, 812 A.2d at 613 (Saylor, J., dissenting) (doctrine "extending greater protection to communication than that provided under the First

In today's climate, such evolution raises the question of whether the Pennsylvania Supreme Court is subject to the argument, raised regularly and pungently by the late Justice Scalia that the concept of a "living constitution" licenses judicial misfeasance, and that courts should be bound by the constitution's "original intent" or perhaps "original meaning." Justice Scalia has passed on from his active role in public life, but his claim that the United States Constitution is "dead, dead, dead" is very much alive.[181]

There are reasons to be skeptical of a Scalian critique of a living Pennsylvania Constitution. To begin with, even if one were to grant that "original intent" or "original meaning" is a desirable and useful interpretive mandate in the federal context—a point of some substantial contention—it is a bit mysterious what "original meaning" would govern in construing the Pennsylvania Constitution of 1968.

The language of article I, section 1 recognizing "men are born equally free and independent," for example, was a part of the original Declaration of Rights adopted by the Convention of 1776.[182] The provision was readopted verbatim in 1790, 1838, and 1874 and became part of the Constitution of 1968. Should the original meaning of "equality" date from the extra-legal Convention of 1776, when the provision was adopted by a group chosen by a narrow electorate of 6000, or from 1790 when the provision was readopted and modified by a more broadly elected, but still extra-legal, convention? From 1838 when a constitution was first adopted by a convention that was legally convened, and was ratified by Pennsylvania voters? From the most recent rounds of electoral ratification in 1968?

Amendment . . . has previously been applied to forms of pure speech as opposed to the communicative aspects of conduct or symbolic speech"). *Compare also* Ullom v. Boehm, 142 A.2d 19, 21, 24 (Pa. 1958) (summarily rejecting article I, section 7 challenge to prohibitions on price advertising by opticians because "it impairs the plaintiff's right of freedom of speech."), *with* Commonwealth, Bureau of Prof'l & Occupational Affairs v. State Bd. of Physical Therapy, 728 A.2d 340, 343–44 (Pa. 1999) (invalidating advertising by chiropractors under article I, section 7).

181. *See, e.g.*, Prakash, *supra* note 10, at 27 ("The Justice had at least two black beasts. First, he rejected the claim that the meaning of laws could drift or change without a formal change in text. This opposition made him dead set against the theory of the living Constitution. He was certain that something could not become unconstitutional (or constitutional) merely because political views or moral sensibilities had changed. Hence he liked to exclaim that the Constitution was not living but 'dead, dead, dead.' Second, and in keeping with his opposition to a living Constitution, the Justice combated the tendency of judges to read their preferences into the law. 'Now the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law.'" (alteration in original) (footnote omitted)).

182. PA. CONST. of 1776, ch. I, § 1.

Mysteries proliferate. Pennsylvania's constitutional equality analysis actually springs doctrinally not only from article I, section 1, but also from article III, section 32, adopted in 1874 by convention and electorally ratified, and modified by legislatively proposed and electorally ratified amendment in 1967.[183] And from article I, section 26 legislatively proposed and adopted by the electorate in 1967.[184] If—to simplify matters—each of these provisions should be construed according to the "original meaning" when they were initially promulgated, would courts need to shuttle back and forth among the centuries in evaluating claims of unconstitutional differential treatment? Should they look for consensus? Should they give primacy to legal as opposed to extra-legal initiatives? Should they seek a majority of decision makers, or provisions, or a flow of understanding?

And what of the requirement of tax uniformity in article VIII, section 1? The provision was originally proposed and ratified in 1874. Voters rejected efforts to amend it in 1913 and 1938. It was specifically preserved inviolate by the legislature that called for a referendum on a Convention in 1967, and by the question put to the voters who passed the referendum in 1967, and retained by the Convention and the Constitution of 1968.[185] Yet at the time that the legislators and voters preserved it, informed observers understood, for better or worse, that the clause had manifestly taken its meaning from a process of continued judicial construction and evolution.[186] Both the actual participants and reasonable observers had every reason to expect that the process would continue. So, the "original understanding" in 1967 was that judges would not be particularly constrained by a static originalism.[187]

Acknowledging the reality of a "living constitution" seems the only sensible way to begin to think about construing the Pennsylvania Constitution. After all, the underlying document really does grow, the courts' explication of the changing text manifestly evolves over time, and the ratifying People periodically recast the document without challenging the evolution of doctrine.

The challenges to originalism as a singular and preclusive strategy for construing the Pennsylvania Constitution run deeper still. "Original

183. *See supra* note 65 and accompanying text.

184. PA. CONST. art. I, § 26.

185. *See supra* note 67 and accompanying text.

186. *See In re* Lower Merion Township, 233 A.2d 273, 276 (Pa. 1967) ("[T]he uniformity clause of the Pennsylvania Constitution has followed a path through our courts that is easily as unpredictable and winding as Alice's road through Wonderland.").

187. Similarly, in 1968, Pennsylvania's courts had retained their practice of examining exercises of government authority for a "fair and substantial relation" to legitimate government interests. *See infra* App. C, Section C.

intent" or "original meaning" must incorporate some conception of the ways in which language will be judicially construed. Even if we were persuaded that Pennsylvania constitutional analysis might be appropriately tied to 1776, or 1790, or 1838, or 1874, or 1967, or 1968, the process of deriving the "original meaning" of the provisions in that era would confront the question raised pointedly a generation ago by Professor Powell, and mooted since: Did the promulgators understand, or would a contemporaneous reasonable legal observer expect that their work would be construed in originalist terms—and more broadly, what was the original legal meaning, in light of the strategy the framers or ratifiers expected the courts to deploy in constitutional interpretation and construction?[188]

In 1968, the convention proposed, and the Pennsylvania electorate adopted an extensive reworking of the judicial system. Any politically aware citizen would have understood the judicial authority of constitutional review in light of the recent work of the United States Supreme Court.

Such a citizen would be aware of the New Deal Revolution.[189]

188. *See* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885–88 (1985); *cf.* Suzanna Sherry, *The Founders' Unwritten Constitution,* 54 U. CHI. L. REV. 1127, 1127–28 (1987); Suzanna Sherry, *Natural Law in the States*, 61 U. CIN. L. REV. 171, 171 (1992). The turn to "original meaning" has not avoided the problem, since the "original meaning" of legal terms must incorporate a conception of the expectation of the methods by which meaning is derived from the enacted text. For inquiries by enthusiasts for originalism, see generally John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 768 n.66 (2009); John O. McGinnis & Michael B. Rappaport, *The Constitutional and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1325–32 (2018); Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1225–27 (2012); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 858–64 (2009).

189. *Compare, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399–400 (1937) ("There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. . . . Our conclusion is that the case of Adkins v. Children's Hospital, supra, should be, and it is, overruled."), *with id.* at 587 (Sutherland, J., dissenting, joined by Van Devanter, McReynolds, Butler, JJ.) ("It is urged that the question involved should now receive fresh consideration, among other reasons, because of 'the economic conditions which have supervened'; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when

The accepted canon for a legally sophisticated observer would include Chief Justice Hughes declaiming:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: "We must never forget, that it is *a constitution* we are expounding a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." When we are dealing with the words of the Constitution, said this Court in Missouri v. Holland, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."
>
> Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application. . . . The vast body of law which has been developed was unknown to the fathers, but it is believed to have preserved the essential content and the spirit of the Constitution. . . . This development is a growth from the seeds which the fathers planted.[190]

In 1968 the alert citizen would understand the proposed Pennsylvania Constitution in the context of the Warren Court's growing edifice of living constitutionalism, from *Reynolds v. Sims*[191] in 1964, to *Griswold v. Connecticut*[192] in 1965, *Miranda v. Arizona*[193] and *Harper v.*

written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.").

190. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442–44 (1934) (emphasis added) (citations omitted).

191. 377 U.S. 533 (1964).

192. 381 U. S. 479 (1965).

193. 384 U.S. 436 (1966).

Virginia State Board of Elections[194] in 1966, and *Loving v. Virginia*,[195] *Katz v. United States*,[196] and *In re Gault*[197] in 1967. A sophisticated legal observer would have noted as well that the premise of a "living constitution" was a standard understanding not only of liberal lions but of the most staid and lawyerly of Justices.[198]

It is hard to avoid the conclusion that the expectation that Pennsylvania judges would construe a "living constitution" would have been bound up with the "original meaning" of a unified judicial system; and that the "original intent" of the 1968 Constitution—if it is relevant—was that judges should transcend originalism.

V. CONCLUSION

In 1976, Justice Rehnquist observed: "At first blush . . . a living Constitution is better than what must be its counterpart, a dead Constitution. It would seem that only a necrophile could disagree."[199] In 1968, the People of Pennsylvania had no reason to expect that their judiciary would be afflicted by constitutional necrophilia. And today, the Justices who have construed a living Pennsylvania Constitution, with due regard for text, history, and tradition over the last half century have no reason to be abashed by their failure to adopt it.

194. 383 U.S. 663 (1966).
195. 388 U.S. 1 (1967).
196. 389 U.S. 347 (1967).
197. 387 U.S. 1 (1967).
198. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."); *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) ("For reasons stated at length in my dissenting opinion in Poe v. Ullman . . . I believe . . . . the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom."); Rochin v. California, 342 U.S. 165, 170–71 (1952) (Frankfurter, J.) ("[T]he verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application. . . . To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed."); *cf.* White v. Weiser, 412 U.S. 783, 798 (1973) (Powell, J., concurring, joined by Burger, C.J., & Rehnquist, J.) ("[T]he Constitution-a vital and living charter after nearly two centuries because of the wise flexibility of its key provisions.").
199. William H. Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693, 693 (1976) (emphasis omitted).

ruling, rates of insured unemployment dramatically higher than the national average. In four of the five states which invalidated such legislation, the rate of insured unemployment prior to the decision was significantly lower than the national average.[65] The Washington court was the only one to strike down industrial financing legislation in the face of an unemployment rate markedly higher than the national average;[66] and it is noteworthy that this is the only invalidating decision which was the product of a divided court. These statistics must, of course, be viewed with caution. They do suggest, however, that economic conditions have been a significant factor in many judicial decisions. The figures indicate that favorable decisions may be expected in states where the economic need for them is strong, and invalidating decisions may be anticipated in states where economic need is less urgent. The probability of accurate prediction in the latter states, however, is less certain.

III. The Emergence of State Constitutional Provisions Prohibiting Public Financial Assistance to Private Enterprise

The state constitutional limitations which threaten to restrict current programs of public industrial financing cannot properly be analyzed without reference to their historical background. The history of these provisions has been related before and will be set forth here only summarily.[67] It begins during that frenetic period in American history, the railroad-aid bond era. During the 1830's and 1840's, the economies of the eastern states were preparing for and commencing their "take-offs." The construction of adequate social overhead capital, particularly railroads and canals, was an essential precondition of that development.[68] As pressure mounted for longer railroads to penetrate more sparsely settled areas, private capital was not readily forthcoming. A demand for the use of public credit accordingly developed. During the mid-nineteenth century, several state governments filled this financial vacuum by lending their credit or by borrowing in order to purchase railroad shares. The panic of 1837, however, forced a more sober approach, resulting in the first adoption of state constitutional

[65] *Ibid.*

[66] Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959); see note 64 *supra.*

[67] See generally Adams, Public Debts 301-06, 317-42 (1893); Cleveland & Powell, Railroad Finances 31-32 (1920); Hillhouse, Municipal Bonds 143-99 (1936); Secrist, An Economic Analysis of the Constitutional Restrictions Upon Public Indebtedness in the United States 13-44, 54-83 (1914); Wright, Economic History of the United States 280-86 (1949).

[68] See Rostow, The Stages of Economic Growth 24-26, 38 (1960). Compare text accompanying notes 7-8 *supra.*

limitations on incurring state debt. But the constitutional changes adopted placed restrictions upon state debt only. It was generally assumed that the new limitations had no application to political subdivisions.[69] Legislatures freely authorized counties and municipalities to incur debt to aid railroad construction, and these units did so eagerly. The mood of euphoric optimism which prevailed was soon replaced, however, by one of disillusionment. Many railroad lines were abandoned as unprofitable, thus dangerously impairing the credit of the many municipalities which had financed them. The result was a second constitutional reaction, directed this time at restricting the financial activities of political subdivisions as well as of the states.

Debt limitations, provisions requiring electorate approval of borrowing, prohibitions against the state's becoming a party to any work of internal improvement, and prohibitions on financial aid to private enterprise were the principal constitutional limitations which emerged. The latter prohibitions are of particular interest in this study. Three principal types predominate. First, and most common, is the clause—referred to herein as the credit clause—which provides that the credit of the state and of its political subdivisions "shall not in any manner be given or loaned to or in aid of any individual, association or corporation." [70] A second type, almost as fashionable as the first, is a clause —referred to herein as the stock clause—which prohibits the state and political subdivisions from becoming stockholders in any corporation.[71] These two provisions were a direct response to two common methods of providing public financial assistance to railroads. One method was public guaranty of railroad bonds, which in some instances took the form of an exchange of railroad bonds for governmental obligations, the latter then being sold on the market by the private corporation.[72] In reality, the railroad was the principal debtor and the more attractive public credit was made available only to assist it in raising the neces-

[69] Prettyman v. Supervisors of Tazewell County, 19 Ill. 406 (1858); City of Aurora v. West, 9 Ind. 74 (1857) (internal improvement clause); Comm'rs of Leavenworth County v. Miller, 7 Kan. 479, 491-94 (1871) (internal improvement clause); Davidson v. Comm'rs of Ramsey County, 18 Minn. 482, 494-95 (1872); Benson v. Mayor of Albany, 24 Barb. 248, 258-59 (N.Y. Sup. Ct. 1857); Cass v. Dillon, 2 Ohio St. 607, 614-15 (1853); Clark v. City of Janesville, 10 Wis. 136, 170-75 (1859); Bushnell v. Beloit, 10 Wis. 195, 221-28 (1860). *Contra,* People *ex rel.* Bay City v. State Treasurer, 23 Mich. 499, 503-05 (1871).

[70] *E.g.,* PA. CONST. art. 9, § 6. This clause first appeared in the Rhode Island Constitution of 1842 as a limitation on the state in the absence of electorate approval. It next appeared in the New Jersey Constitution of 1844 (art. 4, § 6, par. 3) and the New York Constitution of 1846 (art. 7, § 9) as absolute limitations on the state.

[71] *E.g.,* PA. CONST. art. 9, § 6. This clause first appeared in the Iowa Constitution of 1846 (art. 8, § 2) as a limitation on the state.

[72] See, *e.g.,* Society for Sav. v. City of New London, 20 Conn. 174 (1860); Benson v. Mayor of Albany, 24 Barb. 248, 258 (N.Y. Sup. Ct. 1857); Rogan v. City of Watertown, 30 Wis. 259 (1872); see CLEVELAND & POWELL, *op. cit. supra* note 67, at 31-32.

sary capital. As a variant of this procedure, there were instances of the donation of county and municipal bonds to railroad corporations.[73] The credit clause was designed to eliminate these forms of financial aid to private enterprise. However, in the case of the political subdivisions, the other method—stock subscriptions—was by far the most common form of financial assistance.[74] Typically railroad stock was exchanged for public bonds, the latter, of course, being duly sold by the corporation on the market. Even though the public stock subscriptions were almost universally financed by borrowing, the legislatures and courts of the time drew a clear distinction between an exchange of bonds for bonds, prohibited by the credit clause, and an exchange of public bonds for railroad stock, which was viewed as a form of joint venture in the business of railroading not prohibited by the credit clause.[75] This distinction made necessary the stock clause as an additional constitutional safeguard against public financial assistance to the railroads.

The credit and stock clauses, however, did not erect any barrier against loans or donations financed out of current taxation, or against gifts of land.[76] A number of states, therefore, adopted additional prohibitions barring this type of aid, even though it did not occur in significant proportions. This third type of clause, somewhat less common than the credit and stock clauses, varies in wording from jurisdiction to jurisdiction. Pennsylvania's is typical in commanding the legislature not to authorize any political subdivision "to obtain or appropriate money for . . . any corporation, association . . . or individual." [77]

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[73] See, *e.g.*, Sweet v. Hulbert, 51 Barb. 312 (N.Y. Sup. Ct. 1868); Whiting v. Sheboygan & F.R.R., 25 Wis. 167 (1870) (act held invalid).

[74] See *e.g.*, Clarke v. City of Rochester, 24 Barb. 446 (N.Y. Sup. Ct. 1857, *aff'd*, 28 N.Y. 605 (1864); Cass v. Dillon, 2 Ohio St. 607 (1853); Nichol v. Nashville, 28 Tenn. 252 (1848). Municipal shareholdings were often substantial. At the close of the year 1851, for example, political subdivisions in Pennsylvania had subscribed to almost six million dollars of stock in the Pennsylvania Railroad as compared with private subscriptions of under two and one-half million dollars. See BURGESS & KENNEDY, CENTENNIAL HISTORY OF THE PENNSYLVANIA RAILROAD COMPANY 58 (1949).

[75] See note 156 *infra*.

[76] The language of the credit clause itself clearly does not embrace moneys paid out of current revenues. However, the only nineteenth-century decision so holding appears to be Merchants' Union Barb-Wire Co. v. Brown, 64 Iowa 275, 20 N.W. 434 (1884). Twentieth-century cases are all in accord. Industrial Dev. Authority v. Eastern Ky. Regional Planning Comm'n, 332 S.W.2d 274 (Ky. 1960); Opinion of the Justices, 337 Mass. 800, 152 N.E.2d 90 (1958); see Andres v. First Arkansas Dev. Fin. Corp., 230 Ark. 594, 324 S.W.2d 97 (1959); Halbert v. Helena-West Helena Industrial Corp., 226 Ark. 620, 291 S.W.2d 802 (1956). With respect to the stock clause, see note 156 *infra*.

[77] PA. CONST. art. 9, § 7 (applicable to municipalities). The New York clause is clearer and broader in prohibiting the giving or lending of money or property. See N.Y. CONST. art. 7, § 8, art. 8, § 1. More limited than both the Pennsylvania and New York versions is the clause adopted in Kentucky which is applicable only to the state and which is limited to donations. KY. CONST. § 177. The first clear version of the current appropriations clause appears to be article 9, section 10, of the Pennsylvania Constitution of 1873.

This type of provision will hereafter be referred to as the "current appropriations" clause, and the three clauses will be generically termed "public aid limitations."

At the turn of the century, some form of public aid limitation had been incorporated in the constitutions of a large majority of the states. For better or for worse, they are still with us, virtually unchanged. Although the public aid limitations took certain common forms, the pattern which has emerged throughout the country is not uniform. The constitutional movement of the nineteenth century was an extremely pragmatic one; each change in each state was a direct reaction to the specific evils which had manifested themselves in that and perhaps neighboring jurisdictions. Some constitutions therefore contain only a credit clause, others join to it a stock clause, and still others have all three. The potential for diversity is further intensified by the fact that any or all of these restrictions may apply only to the state, to counties, to cities and towns, or to a specified combination of these.[78]

It is appropriate at this point to consider in somewhat greater detail the specific evils to which the public aid limitations were addressed. The term "lending of credit," so popular in the nineteenth century but now relatively obsolete, is significant. A basic element of the railroad-aid schemes was the marketing of state and municipal obligations, without direct governmental control, by the corporation which was to receive the proceeds. The common pattern involved delivery to the railroad of governmental bonds payable to the corporation or bearer, either as a donation or in exchange for shares; the corporation in turn disposed of the bonds as it saw fit.[79] They were often sold in eastern markets for as low as 65 to 70 cents on the dollar.[80]

In addition, there was practically no public control over the planning of the railroad project or over the actual expenditures of publicly contributed funds. These functions were completely delegated to private corporate officials. To phrase it more dramatically, but no less accurately, there was a total abdication of public responsibility. Not infrequently, railroad planning was so speculatively conceived and incompetently executed that the proposed line was never completed. Waste and dishonesty in the expenditure of funds led to corporate insolvency and abandonment of routes. Finally, even if the road was completed and put into use, there was the danger of mismanagement in its operation, which was free from any significant government con-

[78] See note 91 *infra* and accompanying text.

[79] See, *e.g.*, City of Bridgeport v. Housatonic R.R., 15 Conn. 475 (1843). See generally Note, *County Subscriptions to Railroad Corporations*, 20 U. PA. L. REV. 737 (1872).

[80] See HILLHOUSE, *op. cit. supra* note 67, at 150; *cf.* Parkersburg v. Brown, 106 U.S. 487, 495 (1883).

trol.[81] The public was commonly burdened with enormous debt while its interest in improved transportation, which motivated projects in the first place, was completely or substantially frustrated.

The nineteenth-century experience which gave rise to the public aid limitations demonstrates that if public funds are to be risked, the risk must flow from public rather than private decision. Adequate protection of the public financial interest necessitates public control consonant with public financial risk. However, in several jurisdictions in which the state had directly participated in railroad and canal construction and operation, the constitutional revolution went even further. Provisions that "the state shall not be a party to, nor be interested in any work of internal improvement, nor engage in carrying on any such work" were adopted.[82] This type of clause, invariably drafted as a limitation on the state, has generally been interpreted not to limit political subdivisions.[83] Unlike the public aid limitations, the internal improvement clause is directed at financial risk flowing from public decision making as well as that incident to uncontrolled private decision making.[84]

The constitutional movement soon produced a complementary judicial reaction—the enunciation of the public purpose doctrine.[85] Its first clear articulation was by Chief Justice Black of the Supreme Court of Pennsylvania in 1853, in *Sharpless v. Mayor of Philadelphia.*[86] This was a taxpayer's suit which challenged the validity of several acts of the legislature authorizing the city to subscribe to stock in specified railroads, and to raise the necessary funds by borrowing. Although holding the statutes valid, the court declared that it was implicit in the state constitution that taxes could be levied only for public purposes. A statute which purported to tax for purposes clearly unrelated to government would be neither legislation nor taxation. A further implication of the opinion was that any purported tax statute which crossed the public-private barrier would violate the due process clause of the state constitution, as a taking of property for private use.

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81 See HILLHOUSE, *op. cit. supra* note 67, at 152-53; see, *e.g.*, Garland v. Board of Revenue, 87 Ala. 223, 225, 6 So. 402, 403 (1889); Sun Printing & Pub. Ass'n v. Mayor of New York, 152 N.Y. 257, 268-69, 46 N.E. 499, 501 (1897).

82 *E.g.*, MICH. CONST. art. 10, § 14.

83 Commissioners of Leavenworth County v. Miller, 7 Kan. 479, 491-97 (1871); Cass v. Dillon, 2 Ohio St. 607, 614-15 (1853); Bushnell v. Beloit, 10 Wis. 195, 221-26 (1860), cited with approval in State *ex rel.* Martin v. Giessel, 252 Wis. 363, 371, 31 N.W.2d 626, 630 (1948). *Contra*, Attorney General *ex rel.* Brotherton v. Common Council of Detroit, 148 Mich. 71, 111 N.W. 860 (1907).

84 See Rippe v. Becker, 56 Minn. 100, 114, 57 N.W. 331, 334 (1894); State *ex rel.* Jones v. Froehlich, 115 Wis. 32, 38, 91 N.W. 115, 116-17 (1902).

85 See generally McAllister, *Public Purpose in Taxation*, 18 CALIF. L. REV. 137 (1930).

86 21 Pa. 147 (1853).

This substantive due process argument—as a matter of state constitutional law—was later more clearly enunciated by other courts,[87] and a number of state constitutions were amended expressly to incorporate the limitation.[88] Thus was fashioned a powerful new judicial tool. The public purpose doctrine was subsequently incorporated by the United States Supreme Court into the fourteenth amendment;[89] but it is now clear that the Court will defer to the state legislatures in the area of taxation so as to permit local economic experimentation.[90]

While the public purpose doctrine has been characterized by the courts as a limitation on the power to tax, it is more realistically a limit on the spending power, except in the unusual case of a special tax levied to finance a specific spending program. Both the public purpose test and the public aid limitations, therefore, perform the same general function as constitutional controls of expenditures.

IV. The Public Purpose and Public Aid Limitations in the Courts

Since the public purpose test goes no further than the public aid limitations, it need not be resorted to in any instance in which a specific constitutional provision is applicable to cases involving alleged public financial assistance to private enterprise, or, as it will be hereinafter referred to, the enterprise aid issue. However, as was noted earlier, the public aid limitations are not uniform in their applicability. Some states have no public aid limitations, and those that do usually have gaps in coverage, in that some governmental units are not limited or that no restriction is placed on the use of current appropriations.[91] The

[87] See Opinion of the Justices, 58 Me. 590 (1871); People *ex rel.* Bay City v. State Treasurer, 23 Mich. 498, 501-02 (1871).

[88] *E.g.*, Ky. Const. § 171. See McAllister, *supra* note 85, at 138 n.2.

[89] Jones v. City of Portland, 245 U.S. 217 (1917); *cf.* Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 158 (1896).

[90] The refusal of the Supreme Court to give the taxpayers any relief in Green v. Frazier, 253 U.S. 233 (1920) and Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938) compels this conclusion.

[91] In order to determine the extent to which the various public aid limitations have been adopted and the diverse pattern which has emerged, a study of 30 state constitutions was made, limited to the credit clause and the current appropriations clause. (The stock clause is generally joined with the credit clause and, as explained in note 156 *infra*, is of little practical importance today.) The results of this 30 state study are as follows:

No credit clause limiting the state	2
Limited [a] credit clause limiting the state	1
No credit clause limiting political subdivisions [b]	6
Limited [a] credit clause limiting political subdivisions	4
No current appropriations clause limiting the state	16
Limited current appropriations clause limiting the state	1
No current appropriations clause limiting political subdivisions	16

[a] The term "limited" is used to refer to a limitation which is subject to being overridden by a specified procedure, such as a vote by the majority of voters in the municipality, or in the case of the state, a specified majority of the legislators. See, *e.g.*, Tenn. Const. art. 2, § 29.

[b] See note 196 *infra* and accompanying text.

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STATE CONSTITUTIONAL PROHIBITIONS AGAINST USE OF PUBLIC FINANCIAL RESOURCES IN AID OF PRIVATE ENTERPRISES

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Almost all state constitutions include express provisions barring the use of public financial resources in aid of private enterprises. Most of these provisions state rather specifically what and to whom state resources may not be loaned, given, or traded. A few are couched in more general terms. In some states, however, recent constitutional amendments have substantially removed the prohibitions.

In recent years, there has been a marked tendency for those who control state governments to formulate and accommodate creative methods of extending government financial aid to private enterprise. No one questions that these programs endow individuals business interests with public money, but they are justified by their supporters as having potential to vitalize state economies and provide jobs.

Inevitably, stress has arisen between the interest in maintaining the integrity of state constitutions and protecting public financial resources under constitutional mandate, and the interest in advancing state economies through legislation authorizing financial assistance to businesses.[1] This stress has directed renewed attention to the constitutional provisions involved and has yielded a substantial amount of litigation as well.

This article will survey the provisions in state constitutions that ***178** bar use of public financial resources to aid private entities. It will also discuss some recent cases construing that genre of constitutional provision. Finally, it will offer some observations on judicial interpretation and popular control of state constitutions.

I. SURVEY OF STATE CONSTITUTIONAL PROVISIONS

A. Overview

Forty-six state constitutions have substantial provisions, variously phrased, which expressly bar use of state financial resources for certain ***179** private or non-public purposes.[2] Of these, 41 include a specific prohibition barring the state or a political subdivision from lending its credit or its faith to, or subscribing to or owning stock in, or giving its resources away to, private enterprises, or some cumulative combination of such prohibitions.[3] There are five states whose constitutions' ***180** express prohibitions are stated more generally as bars against the use of public money for purposes that are not public or for works of internal improvement not wholly owned by the state.[4]

The prohibitions can be broken down generally into categories according to their specific language. Analysis according to the text is important for a number of reasons, several of which are quite practical. First, since it is, after all, a written document that is being construed, the judges who decide cases involving these provisions generally acknowledge, explicitly or implicitly, the language of the text.[5] Second, among judges, practitioners and theorists, the text of the constitution itself is probably the most widely accepted source of constitutional meaning.[6]

***181** Because of the many textual variations, however, categorization of the types of provisions is not fully fair to the

meaning of any particular provision, and each provision should be scrutinized on its own terms in the search for its meaning. Also, it should be noted that frequently a constitution will include more than one of the various types of prohibitions and that multiple money-use prohibitions in a constitution tend to overlap.[7] Yet for purposes of overview, such categorization is useful.

B. Lending of Credit

The most common type of bar forbids the lending or giving of the credit or faith of the government.[8] Thirty-nine state constitutions include such a bar.[9]

*182 *C. Ownership of Stock*

The next most frequently appearing bar forbids the state to be a "stockholder," "shareholder" or "subscribe(r)" to stock in a corporation.[10] Twenty-nine constitutions include this prohibition.[11]

D. Gifts

A prohibition against the state's giving away or granting its money or resources is also common,[12] appearing in various forms in 17 constitutions.[13]

*183 *E. Generally Phrased Prohibitions*

As already indicated, the only express bar in five constitutions is one that rather generally forbids use of public financial resources for non-public purposes.[14] A few other constitutions include such a general prohibition in addition to more specific bars.[15]

F. Bars Directed to State and Local Governments

Of the 46 constitutions with substantial, express prohibitions, 44 include bars directed against the use of state financial resources.[16] At least 32 constitutions include bars that either specifically or by reasonable implication bar the use of financial resources of some political subdivision of the state.[17]

*184 *G. Disciplining the Legislature*

In a dozen states the prohibitions are expressly directed to the legislature. That is, they declare that the legislature may not do or authorize the particular prohibited deeds.[18]

H. Reprieves

Provisions have been observed in five state constitutions that declare affirmatively that the government may lend its credit or give away its financial resources.[19] These affirmative authorizations all include express qualifications and are mostly the result of rather recent constitutional amendments.

*185 *I. Second Thoughts*

Amendments to the money-use provisions under discussion have been prolific in recent years, substantially rebutting the suggestion that adoption of such amendments is politically impossible.[20] Some of the amendments have removed limitations on the respective state's power to lend, expend and give away its resources for economic development.[21] But it is also apparent that a number of the amendments adopted left teeth in the affected prohibitions.[22]

J. Of Local Interest

The prohibitions are qualified in many states by exceptions for certain purposes deemed by the framers and ratifiers in those states to be especially worthy. These exceptions provide glimpses of the unique needs, resources and value structures of the people who approved them. Without being exhaustive, Californians have allowed irrigation districts to own stock in private corporations, and retirement funds to invest a certain percentage of their funds in specified stock-holdings;[23] Coloradans have permitted political subdivisions to hold stock in energy development corporations and exempted student loan programs from the state's prohibitions;[24] the people of Massachusetts have exempted grants to "private higher educational institutions" and its ***186** students and their parents;[25] and Missourians have exempted allocation of resources to "aid in public calamity" and to aid certain disadvantaged sectors of the community.[26]

Nebraskans allow the state's credit to be loaned in aid of "adult or post high school education at any public or private institution" in the state;[27] in Rhode Island the state may not pledge the faith of the state for the payment of the obligations of others "without the express consent of the people";[28] Virginians approved an amendment to its prohibition, allowing the General Assembly to establish an authority empowered to guarantee loans to finance industry;[29] and in Wyoming the bar against lending credit or making donations is pushed aside to allow for "necessary support of the poor."[30]

II. JUDICIAL INTERPRETATIONS

The constitutional prohibitions under discussion have undergone continuous judicial construction. Virtually every state has multiple decisions and most have cases decided since 1980. It is not feasible within the framework of this article, therefore, to review or even catalogue all the cases. Of necessity, the discussion here will be limited to representative cases, trends, and non-comprehensive observations.

A. Prohibitions against lending public credit

As noted, the most widely existing bar against use of public financial resources for private purposes is the bar against lending credit. Typically it has two primary elements and a link. The first element is the bar against lending credit. The second is the entity or purpose to or for which the aid may not be extended. In Utah, for example, ***187** the government may not "extend its credit... in aid of any.. private... enterprise."[31]

The lending of credit element is essentially the same in all the constitutions that include it. The element that identifies to whom or for what the resources may not be lent is more varied. By contrast to the Utah language quoted in the prior paragraph, Alaska's language bars use of the "public credit...*except for a public purpose*."[32] Thus, an interpretive judge would consider decisions under Alaska's bar basically inapposite in Utah.

Presumably the specific language and unique constitutional history of each state's prohibitions have affected judicial decisions. Yet, the variations in the interpretation of essentially similar texts from state to state and of the same text within a state over time suggest that more has been involved than interpretation.

1. Lending Credit

Some courts have construed the bar against lending credit broadly and there are decisions preventing a wide variety of uses of public financial resources. In Washington, the state's supreme court has determined that "(a) gift of state funds is within the prohibition... against lending the state's credit."[33] The Washington cases and commentary evidence a reliance on constitutional convention debate for the meaning of their prohibitions.[34]

In Oklahoma it was held in 1984 that a "circuitous route of funneling proceeds from the sale of investment certificates (issued by the Oklahoma Water Resources Board) by way of loan to local entities and Board purchase of local bonds is tantamount... to a 'loan' of State credit to the local entity" and hence unconstitutional.[35] The Missouri court has held the issuance of revenue bonds to be "a lending of public credit, in violation" of the constitution, because the "state's tax ***188** resources are

effectively pledged as the ultimate security for the bonds."[36] An earlier Utah case justified a program on the grounds that public funds were "not being given or loaned to a private person," thereby suggesting that if a gift or loan were involved, it would be an unacceptable lending of credit.[37] The cases construing the bar as a broad prohibition generally rest on reasoning that the term "lend credit" does not have a single precise meaning, that it accommodates a meaning generally of use or placing at risk of state financial resources, and that the constitutional framers intended the prohibitions to be broad protectors against risk of loss and favoritism in the award of public money.

Numerous courts, however, have construed the bar against lending credit narrowly as barring only the guarantee of the debts of another.[38] A literal reading of the phrase "lend credit" appears to support such an approach and may be seen as useful by a court that perceives a financing program under review to be economically beneficial. It is also consistent in this context with the separation-of-powers-based presumption of validity of legislative enactments.

The more entertaining justification for focussing only on guarantees is that they partake of the "snare" and "delusion of suretyship."[39] This justification sees the secondary nature of the government's liability as lulling the guarantor into an optimistic assurance that the primary obligor will pay. It ignores the paradox, however, that such a rationale bars a guarantee under which the state has only a potential and secondary obligation to expend money while at the same time allowing outright gifts of the state's money.

The future-orientation element characteristic of a guarantee is sometimes isolated from the mere-potentiality-of-obligation element as a basis for distinction. Thus, in the recent case of *Hayes v. State Property and Buildings Commission,*[40] the Court upheld as not a ***189** lending of credit legislation which does not commit any future funds to a business. It is "the assurance that the legislature would provide for future appropriations," it was said, "which has been most offensive to this court."[41]

A common type of financing that is almost universally upheld as not a lending of credit is the floating of revenue bonds. Revenue bonds are payable only from revenues of the projects involved and characteristically contain express disclaimers to the effect that the state has no obligation to make any payment on the bonds. Frequently the state does, however, bear the cost of debt service. Use of revenue bonds often has been upheld by reference to the "special fund doctrine."[42] Under this doctrine, no lending of the state's credit occurs where payment of a debt obligation created by the state is to be made from a special fund that consists of non-taxpayer money and that insulates the state from any obligation to pay off the debt. It is logical that if state financial resources are not at stake, then the state has not lent its credit in either a narrow or broad sense. This doctrine appears to have developed as a means of distinguishing general obligation bonds under which the state expressly guarantees payment in case of default--almost universally considered to constitute a lending of credit--from revenue bonds.

Yet, the doctrine has been stated in terms of no lending of credit being involved where "bonds and *other obligations* of the agency are not a debt or obligation of the (government)" and where the public funds are "not being given or loaned."[43] Where the doctrine is stated in this way, a line of demarcation is drawn indicating by negative implication that if public non-bond obligations are incurred, or public funds are given or loaned, then there is a public lending of credit. In a recent case, however, the Utah Supreme Court disregarded without comment the demarcation stated in the earlier cases and held that gifts and loans of state money were not loans of the credit of the state.[44]

190** ***2. Entities and purposes foreclosed

Even where there is a lending of the state's credit there is no violation of the prohibition unless the second element is also satisfied--the element that identifies to whom or for what the state's resources may not be lent. As noted, this second element varies considerably from state to state. Most constitutions bar lending of credit to certain specifically identified entities, such as associations, corporations, private enterprises and persons.

Some courts have read these specifically identifying phrases literally while other courts have translated them generally to mean "non-public purpose." A translation to "non-public purpose" virtually assures that the legislation in question will be upheld because of the almost total deference the courts have accorded legislative determinations of what is a public purpose.

Courts in Washington and Oklahoma are examples of those that have taken the specific identifications on their own terms rather than translating them to "non-public purpose."[45] In a recent case, the Utah Supreme Court also read these identifications literally, expressly declining to convert the specific constitutional language into a general public-purpose test,

and striking down legislation authorizing a subscription to stock as "in aid of...a private corporate...enterprise."[46]

Other recent opinions have glossed the specifically identifying phrases to mean only "non-public purpose." They include opinions of the Supreme Courts of Kentucky and Minnesota. *Hayes v. State Property and Buildings Commission*[47] was a four to three decision upholding a legislative decision upholding a legislative financing scheme which facilitated the establishment of a Toyota industrial complex in Kentucky. A diversity of views was expressed in the main opinion and three separate dissents. The constitutional provision involved provided in part that the "credit of the Commonwealth shall not be given, pledged or loaned to any individual, company, corporation or association."[48] The majority determined that the complex "incremental tax" program under which bonds issued by the state would be paid off incrementally by the tax revenues generated by the Toyota plant and debt service would be paid by the state was not unconstitutional. It stated flatly that "as long as the expenditure of public money has as its ***191** purpose, the effectuation of a valid public purpose," the constitutional provision "is not offended."[49] And it had no difficulty deciding that the legislation's aim of alleviating unemployment was a valid public purpose.

One dissenting judge objected that the case stood for the proposition that "so long as the Governor and General Assembly perceive the need, there are no constitutional restraints on the power of state government to raise and spend money for the benefit of a private business."[50] He also stated that "(i)f the language of the Constitution is to be rewritten, it should be done by constitutional amendment, by vote of the people, and not as a matter of judicial expediency."[51] Another dissenter observed that the constitutional provision "does not, anywhere, mention 'public purpose.' "[52]

In Minnesota the court upheld legislation that authorized the issuance of bonds, the making of loans, the insurance of bonds, the payment of certain fees in connection with the bonds, and the insurance of loans for purposes of business development, pollution control, and energy financing.[53] The constitutional bar provided that the "credit of the state shall not be given or loaned in aid of any individual, association or corporation..."[54] The court interpreted this to mean, however, only that taxes shall be levied and collected for public purposes.[55] It said the rule in Minnesota was that "the mode of financing is not relevant to a determination of whether a public purpose exists,"[56] and it found a public purpose to exist.

In the states where the lending of credit bar includes an express exception for financing that is "for a public purpose," the courts need not gloss or ignore the bar, though it is questionable whether, in those states, the provision is much of a bar.[57] Thus, under the Illinois provision, which mandates that public funds, property, or credit be used solely for public purposes, the court simply and squarely addresses whether the legislature's determination of a "public purpose" is entitled to deference.[58] So also, under a constitutional provision that states ***192** that "no city or village shall have the power to loan its credit for any private purpose or, except as provided by law, for any public purpose,"[59] the Michigan Supreme Court asks only whether the loan of credit is provided by law and whether the court should second-guess the legislature's public purpose findings.[60]

The court in Alaska takes a similar approach under its provision, which bars certain uses of public moneys "except for a public purpose."[61] In *Comtec, Inc. v. Municipality of Anchorage*,[62] the Alaska court upheld as not unconstitutional the financial support of Anchorage Telephone's CPE (customer premises equipment) business from two sources of funds: one, revenues from the sale, lease, or rent of CPE; and two, revenues from non-recourse (revenue) bonds. The court rested its decision on the "public purpose" determination of the municipality, citing its rule that the legislature's determination will be upheld unless it is "arbitrary and without any reasonable basis in fact," "plainly foolhardy" or "without any discernible benefit."[63] It did not consider it necessary, therefore, to decide whether the funds used to market CPE were public money or credit under the constitutional provision.

Deference to a legislative determination that legislation is for a public purpose is routinely given.[64] Where the public purpose test is used, whether it is substituted for more specific constitutional language ***193** or is only followed in those states where its general language is expressly provided, it has been observed that the "consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classified as involving a public purpose, especially in the area of economic welfare."[65]

B. Prohibitions Against Stock Ownership or Subscription

A smaller number of cases has dealt with the bar against state ownership or subscription to stock. Those reviewed fairly

construe the constitutional text and several emphasize the original intent of its framers. In *Board of Trustees of Public Employee's Retirement v. Pearson,*[66] the Indiana court construed the following constitutional provision: "nor shall the State become a stockholder in any corporation or association."[67] The state activity at issue was ownership by the Indiana Public Employee's Retirement Fund (PERF) of common stocks or other equity securities. Under the controlling statute the state had a legal obligation to reimburse PERF for any losses due to financial failure of PERF investments.

The court rejected policy arguments based on testimony that "according to today's wisdom, a prudent and balanced investment policy for PERF would include dealing to some extent in the stock market."[68] Noting that "(j)udges must enforce the Constitution as it was written and intended,"[69] the court emphasized the language of the text and the intent of its framers as reflected in constitutional convention debate. Relying on these sources the court concluded that there was "little doubt that the general purpose of the ... clause (under interpretation) was to bar the State of Indiana from placing state money at risk in corporate stocks,"[70] and held the proposed stock ownership to be unconstitutional. The court distinguished three prior Indiana cases in which the prohibition against state stock-ownership was held not to bar the activity in question.[71]

The clause applied in *Utah Technology Finance Corp. v. Wilkinson*,[72] ***194** provides that the "Legislature shall not authorize the state...to.. subscribe to stock...in aid of any...private...corporate enterprise." This is the narrowest phrasing of all the bars against stock ownership in its prohibition only of "subscri(ption)" to stock. Yet the legislative authorization struck down in *Wilkinson* was precisely what the narrow proscription precluded. The statute purported to authorize use of state money to purchase new issues of stock in new and emerging businesses.

In ruling on the stock-subscription issue, the court relied solely on the constitutional text. It bypassed without comment abundant convention indications presented in the attorney general's briefing that the intent of the prevailing framers was to bar not just subscribing to stock and guaranteeing loans but placing public money at risk generally in direct aid of private businesses. (The convention debate record also includes snippets of comment that support a narrower reading.) The court likewise declined comment on the bearing of such indications on an overlapping or accompanying lending-of-credit issue and in this sense was consistent in its approach. Yet this approach produced the rather anomalous result of forbidding investments of state money, which, though speculative, at least held some potential for financial return to the state, while at the same time sanctioning as constitutional outright donation of unlimited amounts of public money to selected private businesses, so long as there was a legislative declaration (subject only to the condition that the declaration not be arbitrary and capricious) that such donation was for a public purpose. The opinion does, however, have the effect of helping to foreclose speculation and require the legislature squarely and publicly to face its funding decisions as decisions whether or not to make direct and immediate expenditures of public money.

C. Gifts

As noted, at least 17 state constitutions include express bars against making grants, gifts, or donations to private entities.[73] Several recent cases addressing whether tax deductions or retroactive tax exemptions are unconstitutional grants or gifts are illustrative of ***195** decisions under this anti-gift type of provision.

The clause construed in *Opinion of the Justices to the Senate*[74] provided in pertinent part: "No grant, appropriation or use of public money or property...shall be made or authorized by the Commonwealth.... for the purpose of founding, maintaining or aiding any... institution (or) primary or secondary school...."[75] The legislation at issue authorized tax deductions for certain educational expenses incurred in attending public and nonprofit private schools.

First, the court easily found that tax subsidies "are the practical equivalent of direct government grants."[76] It then applied a three-part test enunciated in a prior case: " '(1) whether the purpose of the challenged statute is to aid private schools; (2) whether the statute does in fact substantially aid such schools; and (3) whether the statute avoids the political and economic abuses which prompted the passage of (the constitutional provision).' "[77] It concluded without dissent that the proposed bill, if enacted, would violate the constitution of the commonwealth. The court, it can be observed, found both primary elements of the constitutional provision were met, and though it applied a judicial gloss in testing for the existence of the second element, it did not simply generalize the element to "non-public purpose."

The second illustrative case is *County of Sonoma v. State Board of Equalization.*[78] The pertinent constitutional language reads: "nor shall (the Legislature) have power to make any gift or authorize the making of any gift, of any public money or

thing of value to any individual, municipal or other corporation whatever....."[79] The legislation challenged under the provision extended a tax exemption retroactively for sales of geothermal steam. Energy companies and utilities were beneficiaries of the act.

The court supplemented the constitutional language with the general proposition that "expenditures of public funds or property which involve a benefit to private persons are not gifts within the meaning of the constitutional prohibition if those funds are expended for a public purpose."[80] The court unanimously concluded that the act did not violate the constitution.

The court distinguished a 1970 case in which it had struck down ***196** as unconstitutional a "refund" of monies contributed by taxpayers of the various counties for construction of the Golden Gate Bridge on the grounds that the monies in question had been collected from one group--toll payers--but were to be distributed to another group-- direct tax payers.[81] For purposes of a text-based interpretation of the constitutional provision, that appears to have been a distinction without a difference.

III. CONSTITUTION MAKING

A. By the People or Platonic Guardians

Applying a constitutional provision to a legislative act requires explicit or implicit resolution of the general and fundamental question of who determines what a constitution means. Justice Hughes' famous dictum that the United States Constitution is what the judges say it is contains an element of reality, readily transferable to the constitutions and courts of the states. Yet, the concept of constitution-making by the people is fundamental to our system of government and deeply imbedded in the constitutions themselves and presumably in the people's preferences. And though a lower court in Utah upheld legislation challenged as contrary to the Utah constitutional bar against lending credit on the grounds that "(t)he same electorate which establishes the Constitution also elects representatives to make its laws,"[82] surely the basic state constitution-making contemplated by the constitutions and by traditional understandings of constitutional law is to be done neither by judicial decision nor by simple legislation.

Recent years have seen an active debate between those who emphasize original intent and those who emphasize contemporary values in construing the United States Constitution. Some have taken the position that judges cannot know what the framers and ratifiers really intended and that, in any event, they should not bind themselves to the "anachronistic views of long-gone generations."[83] Others are represented by the comment that those who would enthrone judges as ***197** the voice and conscience of society seek "in the last analysis,... a formula for an end run around popular government."[84]

Although that debate is largely relevant to construction of the state constitutional provisions addressed here, it has been aired widely and will not now be reviewed. Some unique features of state constitutions that significantly affect the debate when it is extended to state constitutions will be noted, however.

Forty-one states have constitutional provisions that expressly preserve to the people the right to alter, reform or abolish their government, or, in a few instances, to establish it.[85] Rhode Island's provision is as follows:
In the words of the Father of his Country, we declare that 'the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.'[86]
These provisions are in addition to the process for amendment by the people established in every state constitution, and the preambles in almost every one identifying the makers of the constitutions in the familiar words: "We the people...."[87] Accordingly, and facilitated by an amendment process less cumbersome than that provided for in the federal Constitution,[88] state constitutions have experienced more ***198** frequent and more specific amendment than has the federal Constitution.[89]

The cumulative references to constitution-making only by the people and only by means of the constitutionally established amendment process must be understood in the context of the need for ongoing judicial application of general principles to particular circumstances. Yet the references announce very clearly an obligation to honor state constitutions as written and intended. The references are not quickly lost on an attorney general who takes seriously his oath to uphold his state's

constitution.[90]

That these provisions commonly are honored in the breach is reflected in a recent article reporting comments of a number of legal commentators.[91] The author observes that "state courts often go beyond simple interpretation of the meaning of laws and state constitutions to become makers of public policy."[92] She quotes Oregon Supreme Court Justice Hans A. Linde, as stating that the "active participation of state judges in the policy process is much more taken for granted and much less controversial than the involvement of federal judges in the national government," and she quotes a co-author of a book on state supreme courts as saying: "They've been making policy all along."[93]

B. Ironies

Apart from one's views of the respective roles of the legislature, the judiciary, and the people in creating constitutional law, whoever makes ***199** the controlling choices with regard to the use of public resources in aid of private enterprises may ponder a number of ironies. One, over the last several decades there seems to have been a tendency to read most bars against government action more and more broadly, as in the case, for example, of the bars of the 14th amendment against certain state action, while at the same time reading the bars against government's allocation of public financial resources in aid of private businesses more and more narrowly. Two, when an interpretivist or originalist argues that the constitution should prevail over legislation in a given case, he is urging the exercise of judicial authority, which vis a vis the exercise of legislative authority he usually resists, to enforce limits on legislative action, which vis a vis judicial activism he usually defends. Three, some business interests that usually oppose government tax and spending programs are advocates of the programs that have been challenged under the constitutional bars discussed. Four, the philosophical interest in preserving popular control of constitutions tends to be split in this debate about use of public money by private enterprise for economic advancement from some of its usual allies among politically conservative business interests.

IV. CONCLUSION

Preserving the integrity of state constitutional money-use prohibitions while at the same time accommodating legislative policymaking enactments designed to advance state and local economies can be difficult. There are a number of facilitating elements, however. They include the language of the constitutional provisions involved, the extensive record of constitutional-convention debate on those provisions available in some states, the presumption of constitutionality of legislative acts, multiple references in state constitutions to constitution-making by the people through the amendment process, and the relatively less cumbersome means available to amend state constitutions. The existence of these elements recommends, I submit, a textually oriented interpretation of the provisions at issue in light of any reliable indications of the intent of their framers and ratifiers, judicial deference to legislative policy judgments not in conflict with constitutional provisions, and application to the amendment process for any constitutional changes the people should choose to make.

Footnotes

[a] The author is an Assistant Attorney General in the office of the Utah Attorney General and as such has participated in litigation involving Utah's constitutional prohibitions against lending credit and subscribing to stock in aid of private enterprises. He also has represented the Utah Legislature in litigation on economic issues and has worked with state economic development issues while serving as counsel to a United States Congressman who was a gubernatorial candidate in Utah. The views expressed herein are those of the author and do not necessarily reflect the views of the office of the Utah Attorney General.

[1] By standard jurisprudence, of course, if a legislative act is barred by a constitution, arguments directed to whether that act is good or bad policy are irrelevant in both legislative and judicial forums.*See, e.g.*, THE FEDERALIST No. 78, at 467 (A. Hamilton) (C. Rossiter ed. 1961) (declaring: "No legislative act, therefore, contrary to the Constitution, can be valid"); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding an act of Congress unconstitutional); United States v. Butler, 297 U.S. 1, 62 (1936) (stating that "(w)hen an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch has only one duty,--to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former"). A constitutional provision itself, however, alone or in the light of convention debate, may reflect original understandings that could form bases for legitimate argument. Indeed, in an observation that counsels

piercing literalness when it does not serve original intent, Justice Holmes wrote that the legislative "will should be recognized and obeyed...it is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it.' " Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908); quoted in Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 391 n. 4 (1939). The provisions under discussion in this article generally reflect, in addition to a policy against favoritism in the use of public funds, a policy of risk aversion.*See, e.g.*, Washington State Hous. Fin. Comm. v. O'Brien, 671 P.2d 247, 249 (Wash. 1983); Port of Longview v. Taxpayers, 85 Wash.2d 216, 231-33, 533 P.2d 128, 129-30 (1975). DeFazio v. WPPSS, 679 P.2d 1316, 1335 (Or. 1984). Thus, arguments directed to their meaning can property take account of those original policies. Moreover, even where a state legislature is not limited by a specific constitutional bar, its determinations as to what is a public purpose generally must still meet the threshold-standard of not being arbitrary and capricious or manifestly wrong.*See, e.g.*, Utah Technology Fin. Corp. v. Wilkinson, 723 P.2d 406, 412-13 (Utah 1986) ("arbitrary and capricious"); State *ex rel.* Amemiya v. Anderson, 545 P.2d 1175, 1181 (Haw. 1976) ("manifestly wrong"). Finally, though inappropriate argument is not recommended, it would be naive not to recognize that, for good or ill, the decisions of many judges as to what is constitutionally barred are affected by their perceptions of what is and what is not good policy.

An important counter-consideration is the basic presumption that legislation must be upheld unless it is shown to be clearly unconstitutional. R. LEE, A LAWYER LOOKS AT THE CONSTITUTION 187 (1981) (stating that "courts should always be conscious of the potential infringement of their constitutional interpretive responsibilities on the policymaking authority of the legislature and that, in cases of doubt, they should err on the side of deference to the legislative judgment").*See also infra* notes 63, 64 and 65 and accompanying text. It is profoundly paradoxical that American government's separation of powers requires the judiciary simultaneously to check the legislature against constitutional violations and to defer to the legislature's non-violate policy judgments.

[2] The four states in whose constitutions no substantial express bar was found are Kansas, Maine, South Dakota, and Wisconsin. The Kansas Constitution includes a bar against the State being a stockholder in a banking institution (art. 13, § 2), but that is so narrow as to have been considered *de minimis* here. The Maine Constitution (art. IX, § 14) and the Wisconsin Constitution (art. VII, § 3) include bars against lending the credit of the state that seem largely to have been dissolved by express exceptions. Presumably in these four states there are general constitutional limitations on the state's taxing power or spending power, or common-law doctrines, to the effect that "public funds cannot be expended for private purposes." Utah Technology Fin. Corp. v. Wilkinson, 723 P.2d 406, 412 (Utah 1986).

[3] Each constitutional provision and the title of the article in which it appears are as follows. ALA. CONST. art. IV, § 94, as amended by amend. 112 (Legislative Department); ARIZ. CONST. art. IX, § 7 (Public Debt, Revenue and Taxation); ARK. CONST. art. XII, §§ 5 and 7 (Municipal and Private Corporations), art. XVI, § 1 (Finance and Taxation), Amendments, art. no. 13; CAL. CONST. art. XVI, §§ 6 and 17 (Public Finance); COLO. CONST. art. V, § 34 (Legislative Department), art. XI, §§ 1 and 2 (Public Indebtedness); DEL. CONST. art. VIII, §§ 4 and 8 (Revenue and Taxation); FLA. CONST. art. VII, § 10 (Finance and Taxation); GA. CONST. art. III, § VI, para. VI (Legislative Branch), art. VII, § IV, para. VIII (Taxation and Finance); IDAHO CONST. art. VIII, §§ 2 and 4 (Public Indebtedness and Subsidies); IND. CONST. art. X, § 6 (Finance), art. XI, § 12 (Corporations); IOWA CONST. art. VII, § 1 (State Debts), art. VIII, § 3 (Corporations); KY. CONST. §§ 171, 177, and 179 (Revenue and Taxation); LA. CONST. art. VII, Part I, §§ 1, 10 and 14 (Revenue and Finance); ME. CONST. art IX, §§ 14 and 14-A (General Provisions); MD. CONST. art. III, § 34 (Legislative Department); MASS. CONST. amends. arts. 62, 84 and 103; MICH. CONST. art IV, § 30 (Legislative Branch), art. VII, § 26 (Local Government), art. IX, §§ 18 and 19 (Finance and Taxation); MINN. CONST. art. XI, §§ 2 and 12 (Appropriations and Finances); MISS. CONST. art. 7, § 183 (Corporations); art. 14, § 258 (General Provisions); MO. CONST. art. III, § 38a (Legislative Department), art. VI, § § 23 and 25 (Local Government); MONT. CONST. art. VIII, § 13 (Revenue and Finance); NEB. CONST. art. XIII, § 3 (State and Municipal Indebtedness), art. XV, § 17 (Miscellaneous Provisions); NEV. CONST. art. 8, §§ 9 and 10 (Municipal and other Corporations); N.H. CONST. part second, art. 5th (General Court); N.J. CONST. art. VIII, § II, para. 1, art. VIII, § III, paras. 2 and 3 (Taxation and Finance); N.M. CONST. art. IV, §§ 26 and 31 (Legislative Department), art. IX, § 14 (State County and Municipal Indebtedness); N.Y. CONST. art. VII, § 8, paras. 1, 2 and 3 (State Finances); N.C. CONST. art. V, § 3, paras. (2) and (3) (Finance); N.D. CONST. art. X, § 18 (Finance and Public Debt); OHIO CONST. art. VIII, §§ 4, 6 and 13 (Public Debt and Public Works); OKLA. CONST. art. X, § 15 (Revenue and Taxation); OR. CONST. art. XI, §§ 5, 6, 7 and 9 (Corporations and Internal Improvements); PA. CONST. art. VIII, § 8 (Taxation and Finance); R.I. CONST. arts. of amend., art. XXXI; S.C. CONST. art. X, § 11 (Finance and Taxation); TENN. CONST. art. II, § 31 (Distribution of Powers); TEX. CONST. art. III, §§ 50 and 52(b) (Legislative Department), art. VIII, § 3 (Taxation and Revenue), art. XVI, § 6 (General Provisions); UTAH CONST. art. VI, § 29 (Legislative Department); VA. CONST. art. X, § 10 (Taxation and Finance); WASH. CONST. art. 8, §§ 5 and 7 (State, County and Municipal Indebtedness), art, 12, § 9 (Corporations other than Municipal); W.VA. CONST. art. 10, § 6 (Taxation and Finance); WYO. CONST. art. 16 § 6 (Public Indebtedness).

[4] ALASKA CONST. art. IX, § 6 (Finance and Taxation); CONN. CONST. article first, § 1 (Declaration of Rights); HAW. CONST. art. VII, § 4 (Taxation and Finance); ILL. CONST. art. VIII, § 1(a) and (b) (Finance); VT. CONST. chap. I, art. 7th (Declaration of

the "Rights...);

[5] *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 54-55 (1974) (construing § 2 of the 14th amendment according to "the understanding of those who adopted (it), as reflected in (its) express language...and in the historical and judicial interpretations" and according to "what it says and what it means"); United States v. Butler, 297 U.S. 1, 62-64 (1936) (relying on the language of the constitutional text invoked); Berry v. Beech Aircraft Corp., 717 P.2d 670, 684 (Utah 1985) (holding that the "plain meaning of the (state) constitutional provisions" controls); P. BOBBIT, CONSTITUTIONAL FATE 25-38 (1982) (discussing text-based interpretations); Wallace, *The Jurisprudence of Judicial Restraint*, in VIEWS FROM THE BENCH 155, 161 (M. Cannon and D. O'Brien eds. 1985) (listing as the first principle of constitutional interpretation: "Stand by the clear language of the Constitution unless doing so is manifestly counter to the Framer's intent"); W.J. Brennan, Jr. "Inside View of the High Court," N.Y. Times, Oct. 6, 1963, § 6 (Magazine), at 35 (stating that, in reaching constitutional decisions, "the text of the Constitution and relevant precedents dealing with that text are (the Justices) primary tools"); Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195 (1987) (stating: "Arguments from text play a universally accepted role in constitutional debate").

[6] *See* authorities cited *supra* note 5. Other sources, of course, have also been employed or proposed.*See, e.g.*, P. BOBBIT, CONSTITUTIONAL FATE, *supra* note 5 (discussing historical, textual, doctrinal, prudential, structural and ethical arguments and what the author refers to as "constitutional expression"); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (criticizing both strict interpretivism and adjudication based on substantive values and proposing a "representation-reinforcing" theory of judicial review); R. BERGER GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) and Berger, *"Original Intention" in Historical perspective*, 4 GEO. WASH. L. REV. 296 (1986) (both Berger works emphasizing original intent); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985) (criticizing use of original intent and proposing other approaches); Maltz,*Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773 (discussing both originalist and non-originalist approaches to constitutional interpretation); Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation, supra* note 5 (identifying arguments from text, framer's intent, constitutional theory, precedent, and moral and policy values, recommending synthesis and hierarchical ranking of arguments, and giving first ranking to arguments from text).

[7] An example is Washington's cumulative and overlapping provisions (WASH. CONST. art. 8, § § 5 and 7 and art. 12, § 9), construed in cases discussed in Spitzer, *An Analytical View of Recent "Lending of Credit" Decisions in Washington State*, 8 U. PUGET SOUND L. REV. 195 (1985). Sometimes the cumulative bars are placed in different sections, as in Washington's format; sometimes they are placed in a single provision. An example of the latter is in the Arizona Constitution, as follows:
Neither the State, nor any county, city, town, municipality, or other subdivision of the State shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company, or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the State by operation or provision of law.
ARIZ. CONST. art. IX, § 7.

[8] A California provision is typical:
The Legislative shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever...
CAL. CONST. art. XVI, § 6.

[9] ARIZ. CONST. art. IX, § 7; ARK. CONST. art. XVI, § 1; CAL. CONST. art. XVI, § § 6, 17; COLO. CONST. art. XI, § 1; DEL. CONST. art. VIII, § 4 (unless "passed with the concurrence of three-fourths..."); FLA. CONST. art. VII, § 10; GA. CONST. art. VII, § IV, paragraph VIII; IDAHO CONST. art. VIII, § 2; IND. CONST. art. XI, § 12; IOWA CONST. art. VII, § 1; KY. CONST. section 177; LA. CONST. art. VII, Part I, § 14 and 14A(no lending of credit, with certain exceptions including insuring mortgages for industrial and other enterprises up to $90,000,000 aggregate); MD. CONST. art. III, § 34; MASS. CONST. amends. art. 62, 84 and 103; MICH. CONST. art. VII, § 26, art. IX, § 18; MINN. CONST. art. XI, § 2; MISS. CONST. art. 14, § 258; MO. CONST. art. III, § 38a; NEB. CONST. art. XIII, § 3; NEV. CONST. art. 8, § 9; N.J. CONST. art. VIII, section II, paragraph 1; N.Y. CONST. art. VII, § 8, para. 1(but exceptions largely consume the rule); N.C. CONST. art. V, § 3 paras. (2) and (3)(definition of loan of credit in para. (3)(bar against loan of credit unless approved by a majority of voters); N.D. CONST. art. X, § 18; OHIO

CONST. art. VIII, § § 4 and 13 (revenue bonds allowed under § 13); OKLA. CONST. art. X, § 15; OR. CONST. art. XI, § 7 (in excess of $50,000 barred-close to a flat prohibition); PA. CONST. art. VIII, § 8; R.I. CONST. art. of amend. XXXI (may not "pledge the faith of the state" without express consent of the people); S.C. CONST. art. X, 11; TENN. CONST. art. II, § 31; TEX. CONST. art. III, § 50; UTAH CONST. art. VI, § 29; VA. CONST. art. X, § 10; WASH. CONST. art. 8, § 5 and art. 12, § 9; W. VA. CONST. art. 10, § 6; WIS. CONST. art. VIII, § 3 (largely dissolved by the 1975 Amendment found in art. VIII, § 7(2)(a)); WYO. CONST. art. 16, § 6.

10 Idaho's provision is an example: "nor shall the state directly or indirectly, become a stockholder in any association or corporation...." IDAHO CONST. art. VIII, § 2.

11 ARIZ. CONST. art. IX, § 7: ARK. CONST. art. XII, § 7; CAL. CONST. art. XVI, § 17; COLO. CONST. art. XI, § 1; FLA. CONST. art. VII, § 10; GA. CONST. art. VII, § IV, para. VIII; IDAHO CONST. art. VIII, § 2; IND. CONST. art. XI, § 12; IOWA CONST. art. VIII, § 3; KAN. CONST. art. 13, § 2; KY. CONST. art. section 177; LA. CONST. art. VII, part I, § 14; MICH. CONST. art. IX, § 19; MISS. CONST. art. 14, § 258; MONT. CONST. art. VIIi, § 13; NEB. CONST. art. XIII, § 3; NEV. CONST. art. 8, § 9; N.D. CONST. art. X, § 18; OHIO CONST. art. VIII, § 4; OKLA. CONST. art. X, § 15; OR. CONST. art. XI, § 6; PA. CONST. art. VIII, § 8; S.C. CONST. art. X, § 11; TENN. CONST. art. II, § 31; UTAH CONST. art. VI, § 29; VA. CONST. art. X, § 10; WASH. CONST. art. 12, § 9; W. VA. CONST. art. 10, § 6; WYO. CONST. art. 16, § 6.
Utah's provision is the only one of these 29 that directs only that the state may not "subscribe" to stock. All of the other 28 more broadly bar stock ownership.

12 *E.g.*, CAL. CONST. art. XVI, § 6: "nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever (with certain exceptions)."

13 ARIZ. CONST. art. IX, § 7; CAL. CONST. art. XVI, § 6; COLO. CONST. art. V, § 34 ("no appropriation shall be made for" any entity "not under the absolute control of the state"), art. XI, § 2; DEL. CONST. art. VIII, § 4; FLA. CONST. art. VII, § 10; GA. CONST. art. III, § VI, para. VI(a); KAN. CONST. art. 11, § 9 (no internal improvement with state money); KY. CONST. § 177; LA. CONST. art. VII, part I, § 14; MICH. CONST. art. IV, § 30 (no appropriation of public money for private purposes without two-thirds vote); MO. CONST. art. III, § 38a; NEV. CONST. art. 8, § 9; N.J. CONST. art. VIII, § III, para. 3; N.M. CONST. art. IV, § § 26 and 31, art IX, § 14; N.D. CONST. art. X, § 18; OKLA. CONST. art. X, § 15; WYO. CONST. art. 16, § 6.

14 *See supra* note 4 and accompanying text. Hawaii supplies an example: Its constitution provides:"No tax shall be levied or appropriation of public money or property made nor shall the public credit be used, directly or indirectly, except for a public purpose... No grant of public money or property shall be made except pursuant to standards provided by law." HAW. CONST. art. VII, § 4. One of the most generally phrased bars is that of Connecticut's Constitution. It provides that "no man or set of men are entitled to exclusive public emoluments or privileges from the community." CONN. CONST. article first, § 1.

15 KY. CONST. § 171; LA. CONST. art. VII, part I, § § 1 and 10; MICH. CONST. art. VII, § 26; TEX. CONST. art. VIII, § 3, art. XVI, § 6.

16 ALASKA CONST. art. IX, § 6; ARIZ. CONST. art. IX, § 7; ARK. CONST. art. XII, § 5, art. XVI, § 1; CAL. CONST. art. XVI, § § 6, and 17; COLO. CONST. art. XI, § § 1 and 2, art. V, § 34; CONN. CONST. article first, § 1; DEL. CONST. art. VIII, § 4; FLA. CONST art. VII, § 10; GA. CONST. art. III, § VI, para. VI(a), article VII, § IV, para. VIII; HAW. CONST. art. VII, § 4; IDAHO CONST. art. VIII, § 2; ILL. CONST. art. VIII, § 1(a) and (b); IND. CONST. art. XI, § 12; IOWA CONST. art. VII, § 1, art. VIII, § 3; KY. CONST. § 171: LA. CONST. art. VII, part I, §§ 1, 10 and 14; MD. CONST. art. III, § 34; MASS. CONST. amends. arts. 62, 84 and 103; MICH. CONST. art. IX, § § 18 and 19, art. IV, § 30; MINN. CONST. art. XI, § 2; MISS. CONST. art. 14, § 258; MO. CONST. art. III, § 38a; MONT. CONST. art. VIII, § 13; NEB. CONST. art. VIII, § 13; NEB. CONST. art. XIII, § 3; NEV. CONST. art. 8, § 9; N.J. CONST. art. VIII, § 2, para. 1, art. VIII, § III, para. 3; N.M. CONST. art. IX, § 14; N.Y. CONST. art. VII, § 8, paras. 1, 2, and 3; N.C. CONST. art. V, § 3(2)(3); N.D. CONST. art. X, § 18; OHIO CONST. art. VIII, § § 4 and 13; OKLA. CONST. art. X, § 15; OR. CONST. art. XI, § § 5,6 and 7; PA. CONST. art. VIII, § 8; R.I. CONST. arts. of amend., art. XXXI; S.C. CONST. art. X, § 11; TENN. CONST. art. II, § 31; TEX. CONST. art. III, § 50, art. VIII, § 3, art. XVI, § 6; UTAH CONST. art. VI, § 29; VT. CONST. chapter 1, art. 7; VA. CONST. art. X, § 10; WASH. CONST. art. 8, § 5, art. 12, § 9; W. VA. CONST. art. 10, § 6; WYO. CONST. art. 16, § 6.

17 ALA. CONST. art. IV, § 94, as amended by amendment 112; ARIZ. CONST. art. IX, § 7; ARK. CONST. art. XII, § 1; CAL. CONST. art. XVI, § 6; COLO. CONST. art. XI, §§ 1 and 2; DEL. CONST. art. VIII, § 8; FLA. CONST. art. VII, § 10; HAW. CONST. art. VII, § 4; IDAHO CONST. art. VIII, § 4; ILL. CONST. art. VIII, § 1(a) and (b); IND. CONST. art. X, § 6; KY. CONST. § 179; LA. CONST. art. VII, part I, § 14; MICH. CONST. art. VII, § 26; MINN. CONST. art. XI, § 12; MISS. CONST. art. 7, § 183; MO. CONST. art. VI, § § 23 and 25; MONT. CONST. art. VIII, § 13; NEV. CONST. art. 8, § 10; N.H. CONST. part second, art. 5th; N.J. CONST. art. VIII, § III, para. 2; N.M. CONST. art. IX, § 14; N.D. CONST. art. X, § 18; OHIO CONST, art. VIII, § 6; OR. CONST. art. XI, § 9; S.C. CONST. art. X, § 11; TEX. CONST. art. VIII, § 3; UTAH CONST. art. VI, § 29; VT. CONST. chapter 1, article 7th; VA. CONST. art. X, § 10; WASH. CONST. art. 8, § 7; WYO. CONST. art. 16, § 6.

18 CAL. CONST. art. XVI, § 6; COLO. CONST. art. V, § 34; DEL. CONST. art. VIII, § 4; GA. CONST. art. III, § VI, para. VI(a); MD. CONST. art. III, § 34; MINN. CONST. art. XI, § 12; MO. CONST. art. III, § 38a; N.C. CONST. art. V, § 3(2); N.M. CONST. art. III, §§ 26, 31; OR. CONST. art. XI, § 7; R.I. CONST. art. of amend. XXXI; TEX. CONST. art. III, § 50; UTAH CONST. art. VI, § 29.

19 DEL. CONST. art. VIII, § 4 (barring appropriation to a corporation or loan of credit unless approved by three-fourths vote of the legislative assembly); KAN. CONST. art. 11, § 9 (allowing, under a recent amendment, a two-thirds vote of all members of the legislature to authorize the state to participate in projects with the federal government through appropriation of matching funds not raised from property taxes); ME. CONST. art. IX, §§ 14 and 14A (allowing lending of the credit of the state, under a recent amendment by means of guarantees of mortgage payments on, inter alia, industrial, manufacturing and recreational enterprises, not exceeding in the aggregate $90,000,000); OR. CONST. arts. XI-A through XI-J (empowering state to lend credit for a variety of specified purposes with certain exceptions); S.D. CONST. art. XIII, § 1 (authorizing the state to lend its credit to, inter alia, corporations for "the purpose of developing the resources and improving the economic facilities of South Dakota" upon a two-thirds vote of the legislature and subject to regulation by the state) and art. XIII, §§ 12 through 19 (authorizing the state to pledge the credit of the state for a number of purposes, generally upon a two-thirds vote of the legislature.

20 Recent adoption of amendments has been noted in the following states: FLA. CONST. art. VII, § 10 (1974); KAN. CONST. art. 11, § 9 (1958), ME. CONST. art. IX, § 14 (1984), art. IX, § 14A (1978); N.M. CONST. art. IX, § 14 (1974); N.Y. CONST. art. 7, § 8 (1985); OHIO CONST. art. VIII, § 13 (1974); OR. CONST. art. XI, § 6 (1970), art. XI, (1964); R.I. CONST. art. of amend. XXXI (1951); VA. CONST. art. X, § 10 (1970); WIS. CONST. art. VIII, § § 3, 7(2)(a) (1975).
An amendment that would authorize the use of public funds to promote economic development is pending in Oklahoma.*See* OKLA. CONST. art. 10, § 15. To the extent that amendment in any particular state is politically impossible, surely it is not inappropriate to honor the preferences of the people.

21 Amendments in the following states are examples of liberalizing changes. ME. CONST. art. IX, § 14A (added by amendment in 1957 and subsequently amended in 1964, 1965, 1967, 1968 and 1978); VA. CONST. art. X, § 10 (1970).

22 *See, e.g.*, indicated amendments in the following states: FLA. CONST. art. VII, § 10 (1974); N.M. CONST. art. IX, § 14 (1974); OR. CONST. art. VI (1970), art. VII, (1964); R.I. CONST. art. of amend. XXXI (1951).
It may be noted that in at least one state a proposed liberalizing constitutional amendment failed. A proposal that would have authorized the State of Utah to lend its credit "to aid in the establishment or expansion of private industry" was defeated in 1974 by an almost two to one margin. 1974 Utah Laws S.J.R. No. 13.

23 CAL. CONST. art. XVI, § 17.

24 COLO. CONST. art. XI, § § 2 and 2a.

25 MASS. CONST. amends art. 103.

26 MO. CONST. art. III,/121/ 38a.

27 NEB. CONST. art. XIII, § 3.

28 R.I. CONST. arts. of amend. XXXI.

29 VA. CONST. art. X, /121/ 10.

30 WYO. CONST. art. 16, § 6. Exceptions may be found in provisions of other constitutions as well. *See, e.g.,* FLA. CONST. art. VII, § 10 (excepting investments of public trust funds, investments of other public funds in United States instruments, issuance of revenue bonds for certain purposes, use for benefit of electrical energy facilities); NEV.CONST.art.8, § 9 (excepting corporations formed for educational or charitable purposes); N.C.CONST. art.V, § 13 (excepting uses approved by a majority of the voters); OHIO CONST. art. VIII, § 13 (excepting expansively for "lending of aid and credit" for many uses, but not allowing tax moneys to be obligated or pledged for obligations issued); S.C. CONST. art. X, § 11 (excepting joint ownership of state utilities and support of the free public schools).

31 UTAH CONST. art. 6, § 29.

32 ALASKA CONST. art. IX, § 6 (emphasis added).

33 Adams v. University of Wash., 722 P.2d 74, 82 (Wash. 1986); *see also, e.g.,* Washington St. Hwy. Comm'n v. Pacific N.W. Bell Tel. Co., 367 P.2d 605, 610 (Wash. 1961) (accepting the rule of an earlier Washington case that "a grant of state funds to persons not in need was...a gift of the credit of the state and repugnant to the .... constitution").

34 *See, e.g.,* City of Marysville v. State, 676 P.2d 989 (Wash. 1984) (quoting convention debate); Spitzer, *supra* note 7, at 218 (observing that "(i)f there had been loans of state money or credit, the framers would have intended to bar them regardless of the degree of risk").

35 Reherman v. Oklahoma Water Resources Bd., 679 P.2d 1296, 1302 (Okla. 1984).

36 Curchin v. Missouri Indus. Develop. Bd., 722 S.W.2d 930, 933 (Mo. 1987).

37 Tribe v. Salt Lake City Corp., 540 P.2d 499, 504 (Utah 1975).

38 See Utah Technology Fin. Corp. v. Wilkinson, 723 P.2d 406, 412 (Utah 1986) (upholding the grant and loan features of the Act at issue because they do "not empower UTFC to become a surety or guarantor of the debts of the fledgling business it assists"); Opinion of the Justices to H.R., 471 N.E.2d 1266 (Mass. 1984) (upholding an act that allowed for appropriation of funds but not guarantee of debts); Johns Hopkins Univ. v. Williams, 199 Md. 382, 86 A.2d 892 (1952) (interpreting the Maryland "lending of credit" clause only to forbid the state from becoming a surety or guarantor of an obligation of another); Engelking v. Investment Bd., 93 Idaho 217, 458 P.2d 213 (1969) (holding that a loan of state funds was not a loaning of the state's credit); Fairbank v. Stratton, 14 Ill.2d 307, 315, 152 N.E.2d 569, 573 (1958) (stating: "There is a loan of state funds, not of state credit").

39 Grout v. Kendall, 195 Iowa 467, 473, 192 N.W. 529, 531 (1923).

40 731 S.W.2d 797 (Ky. 1987).

41 *Id.*at 800. *See also* Minnesota Energy & Economic Dev. Auth. v. Printy, 351 N.W. 2d 319, 347 (Minn. 1984) (finding no lending

of credit since "the bond insurance and loan insurance are not funded out of future appropriations" but "are funded from money that has already been appropriated by the Legislature").

42 *See e.g.,* Allen v. Tooele Country, 21 Utah 2d 383, 445 P.2d 994 (1968); Hayes v. State Property and Bldg. Comm'n, 731 S.W.2d 797 (Ky. 1987).

43 Tribe v. Salt Lake City Corp., 540 P.2d 499, 503-04 (Utah 1975) (emphasis added). *See also* Municipal Bldg. Auth. of Iron Country v. Lowder, 711 P.2d 273, 281 (Utah 1985) (finding no lending of credit where "(t)he county's credit is not being lent nor is it otherwise at stake.")

44 Utah Technology Fin. Corp. v. Wilkinson, 723 P.2d 406 (Utah 1986).

45 See Adams v. University of Wash., 722 P.2d 74 (Wash. 1986); Reherman v. Oklahoma Water Resources Bd., 679 P.2d 1296 (Okla. 1984).

46 Utah Technology Fin. Corp. v. Wilkinson, 723 P.2d 406 (Utah 1986) (construing UTAH CONST. art. VI, § 29).

47 731 S.W.2d 797 (Ky. 1987).

48 KY. CONST. § 177.

49 731 S.W.2d at 799.

50 *Id*. at 805.

51 *Id*. at 806.

52 *Id*. at 815.

53 Minnesota Energy & Economic Dev. Auth. v. Printy, 351 N.W.2d 319 (Minn. 1984).

54 *Id*. at 338

55 *Id*.

56 *Id*. at 340.

57 *See supra* note 4 for a list of constitutions with only general bars against money uses not for public purposes.

58 Marshall Field & Co. v. Village of S. Barrington, 415 N.E.2d 1277 (Ill.App. 1981).

59 MICH. CONST. art. 7, § 26.

60 Advisory Opinion on Constitutionality of 1986 PA 281, 430 Mich. 93, 422 N.W.2d 186 (1988) (upholding legislation that authorizes municipalities to use tax increment financing to cover certain redevelopment costs and includes a legislative finding that the Act was enacted to create jobs and promote economic growth in the state).

61 ALASKA CONST. art. IX, § 6

62 710 P.2d 1004 (Alaska 1985).

63 *Id*. at 1006. *See also* Lake Otis Clinic, Inc. v. State, 650 P.2d 388 (Alaska 1982) (upholding as for a "public purpose" state financial aid to private non-profit hospitals).

64 *See e.g.*, Comtec, Inc v. Municipality of Anchorage, 710 P.2d 1004, 1006 (Alaska 1985); Marshall Field & Co. v. Village of S. Barrington, 415 N.E.2d 1277 (Ill. App. 1981); Advisory Opinion on Constitutionally of 1986 PA 281, 430 Mich. 93, 422 N.W.2d 186 (1988); County of Sonoma v. State Bd. of Equalization, 241 Cal. Rptr. 215 (Cal. App. 1987); Hayes v. State Property and Bldgs. Comm'n, 731 S.W.2d 797 (Ky. 1987); Hucks v. Riley, 357 S.E.2d 458 (S.C. 1987). Among the strongest presumptions of constitutionality are those stated by the New York courts. *See* Long Island Lighting Co. v. Mack, 137 A.D.2d 285, 529 N.Y.S.2d 502 (N.Y.App.Div. 1988) (citing New York Supreme Court cases); Maresca v. Cuomo, 64 N.Y.2d 242, 250 (1984) stating that the presumption of constitutionality of statutes can be refuted only by proof of unconstitutionality beyond a reasonable doubt); Hotel Dorset Co. v. Trust for Cultural Resources of City of N.Y., 46 N.Y.2d 358, 370 (1978) (stating that there is a presumption that the "Legislature has investigated and found facts necessary to support the legislation...as well as the existence of a situation showing or indicating its need for desirability").

65 Marshall Field & Co. v. Village of S. Barrington, 415 N.E.2d 1277, 1282 (Ill. App. 1981). *See also, e.g.,* Hucks v. Riley, 357 S.E.2d 458 (S.C.1987).

66 459 N.E.2d 715 (Ind. 1984).

67 IND. CONST. art. XI, § 12.

68 *Pearson*, 459 N.E.2d at 716.

69 *Id*. at 717.

70 *Id*.

71 Sendak v. Trustees of Indiana Univ., 254 Ind. 390, 260 N.E.2d 601 (1970) (holding that the state did not become a stockholder through the service of the Board of Trustees of a state university as trustee over common stock donated in trust to the university by private donors); Steup v. Indiana Hous. Fin. Auth., 402 N.E.2d 1215 (Ind. 1980) (holding that the state did not become a stockholder through the special statutory control relationship between the Indiana Housing Authority and assisted corporations); Northern Indiana Bank and Trust Co. v. State Bd. of Fin. of Indiana, 457 N.E.2d 527 (Ind. 1983) (holding that the state did not become a stockholder through its deposit of public funds in savings associations even though they are not depositories under the Depository Act of 1937).

72 723 P.2d 406 (Utah 1986).

73 *See supra* note 13 and accompanying text.

74 514 N.E.2d 353, 355 (Mass. 1987).

75 MASS. CONST. amends. art. 103.

76 514 N.E.2d 353, 355.

77 *Id*.

78 241 Cal. Rptr. 215 (Cal. App. 1987).

79 CAL. CONST. art. XVI, § 6.

80 241 Cal. Rptr. 215 at 221.

81 Golden Gate Bridge and Highway District v. Luehring, 4 Cal. App. 3d 204, 84 Cal. Rptr. 291 (1970).

82 Wilkinson v. Utah Technology Fin. Corp., Memorandum Decision, 4-5 (3d Dist. Dec. 26, 1985).

83 Address by Justice William J. Brennan, Text and Teaching Symposium of Georgetown University (Oct. 12, 1985). *But see, e.g.*, Jenkins v. Bishop, 589 P.2d 770, 771 (Utah 1978) (stating that "(u)nder the universally recognized rule of construction, constitutional provisions should be interpreted and applied in accordance with what was intended by (their) framers").

84 Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693, 706 (1976).

85 ALA. CONST. art I, § 2; ALASKA CONST.art.I, § 2; ARIZ.CONST.art. I,§ 2; ARK. CONST. art. II, § 1; COLO CONST. art. II § 2; CONN. CONST. art. I, § 2; DEL. CONST., preamble; GA. CONST. art. I, § 2, paragraph II; IDAHO CONST. art. I, § 2; IND CONST. art. I, § 1; IOWA CONST. art. I, § 2; KAN. Bill of Rights, § 2; KY. Bill of Rights, § 4; LA CONST. art. I, § 1; ME. CONST. art. I, § 2; MD.CONST. art. I, § 1; MASS. CONST. part the first, art. VIII; MICH. CONST. art. I, § 1; MINN.CONST. art. I, § 1; MISS. CONST. art. III, § 6; MO.CONST. art. I, § 3; MONT.CONST.art. II, § 2; NEV. CONST. art. I, § 2; N.H. Bill of Rights, art. 10th; N.M. CONST. art II, § 2; N.C. CONST. art. I, § 3; N.D. CONST. art.I, § 2; OHIO CONST. art. I, § 2; OKLA. CONST.art. II, § 1; OR. CONST. art. I, § 1; PA. CONST.art.§ 2; R.I. CONST. art. I, § 1; S.C. CONST. art. I, § 1; TENN. CONST. ART. I, § 1; TEX. CONST. art. 1, § 2; UTAH CONST. art. 1, § 2; VT. CONST. chap. 1, art. 7; VA. CONST.art. 1, § 3; WASH.CONST. art. 1, § 1; W.VA.CONST. art. 2, § 2; WYO.CONST. art. I, §1.

86 R.I.CONST. art.1,§ 1.

87 New York's preamble, for example, reads: "WE THE PEOPLE of the State of New York grateful to Almighty God for our Freedom, in order to secure its blessings, do ESTABLISH THIS CONSTITUTION." Only Vermont's and Virginia's constitutions have been observed to be without preambles, though Connecticut's, Delaware's, Tennessee's and Texas' vary the phrasing more or less.

88 For one thing, ratification of an amendment to the United States Constitution by three fourths of the states is a considerable hurdle.

89 The executive director of the Advisory Commission on Intergovernmental Relations is reported to have stated that "the present constitutions of the 50 states have been amended more than 5,300 times." Witt, *State Supreme Courts: Tilting the Balance Toward Change, 1* GOVERNING at 35 (No. 11, Aug. 1988). And a number of states have had more than one constitution, Louisiana having had the largest number with 11 and Georgia being next with 10. *Id*. at 30. This is not to say that amending or establishing a state constitution is no more arduous than enacting legislation. It is more arduous. This serves the function, however, basic to constitutional government, of "preclud(ing) succeeding transient majorities in the legislature from tampering with the principle(s)" established in a constitution directly by the people. Rehnquist, *The Notion of a Living Constitution*, 54 TEX.L. REV. 693, 706 (1976).

90 Utah's constitutionally required oath, by way of example, is: "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this State, and that I will discharge the duties of my office with fidelity.(')" UTAH CONST. art. IV, § 10.

91 Witt, *supra* note 89, at 30.

92 *Id*.

93 *Id*.

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THE PUBLIC TRUST DOCTRINE

Richard A. Epstein

Private and Public Property

From the outset political and legal theory have long been divided on the question of whether various forms of natural resources are in the original position held in common ownership or, alternatively, are subject to private ownership by individual acts of appropriation. Locke, for example, tries to work both sides of the street. He first appeals to Biblical authority to demonstrate that God gave mankind the earth to be held in common: "God, as King David says, Psalm cxv.16, 'has given the earth to the children of men,' given it to mankind in common." (Locke 1690, ch. 5, ¶25). Thereafter he argues that individuals "fix" their property in that portion of the common good with which they mix their labor, even when they act without the consent of others.

Locke's argument rested in part on a theistic foundation. Once that is removed, however, accounting for property rights is far more difficult, for there is no obvious starting point for the analysis, as mankind in general cannot be regarded as joint donees who take by transfer, rather than by acquisition. Locke's argument does not tell us how to think about property when there are no rights, and no grantor, in the state of nature. No longer is the inquiry, how does one get private rights out of public ones, or indeed how to get public rights out of private ones. No longer is there any necessary presumption that all property rights should be either private or public. A mix of rights, some public and some private, is surely conceivable, even if their relative proportions are unclear. Historically, both the common law and Roman traditions were able to accommodate both forms of property, with the navigable waters being perhaps the most nota-

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ble forms of public property—often "inherently" so (see Rose 1986; Sax 1970). The task for a unified theory of property is to develop an account of the original position which accomplishes two things. First, it allows for some property rights to be private and others to be public. Second, it permits correction of any initial allocative mistakes by providing a way for assets to move from one regime of property rights to another. In dealing with these two themes, my emphasis is on property that is owned by the public at large. The "public trust" title given to the paper refers to the legal rules that limit the power of the people, or (in time) the legislature, to dispose of public property.[1]

In addressing the original position, no government is already in place with the power to assign rights in property to single individuals or the public at large. Locke may not have established that mankind in common is the donee of all property, but surely he demolished the divine rights of kings. The inability to locate the original grantor of property in God or in the state has had profound consequences on the shape of political theory, for it has forced both legal and political thinkers to take a more explicit consequentialist view of legal rules and social arrangements. The task of justification has been to show what general set of legal institutions will advance the welfare of the public at large, when measured against its next best alternative. The task is surely daunting, as there is no obvious means to take information about individual utilities and combine them into any unique social welfare function. But by the same token that task is in some sense quite unavoidable: for if one does not look to *any* of the consequences of legal rules, however nebulous and uncertain, then what could furnish a justification for any practice?

In addressing the original position, I believe that the most fruitful line of inquiry stresses the relationship between the rules of transfer and the rules of original ownership (see Holderness 1985). In some logical sense rules of initial acquisition are necessarily prior to the rules of transfer. After all, how can anyone transfer property that he

[1]In more recent times efforts have been made to expand the scope of the public trust doctrine so that a public trust is impressed upon ordinary private property simply because individuals have notice of the types of regulations that might be imposed. "Expectations must be deemed to change as time, circumstances and public attitudes change, and expectations which might have been reasonable at one time can cease to be reasonable." See Sax (1981, p. 10). Stated in this form, the public trust doctrine strays from its original function, that of limiting government power over public assets, and addresses a new function, that of expanding government power over private property. The newer approach to the public trust doctrine is simply another unfortunate effort to create instability in private rights, in harmony with the modern efforts to eviscerate the eminent domain clause. I have said enough about eminent domain already (see Epstein 1985a) and do not address this constellation of issues further here.

does not own? Yet in another sense one can determine the rules of original acquisition only with an appreciation of the importance of the rules of transfer. The needed explanation rests in a single phrase: "mutual benefit." There are all sorts of reasons why someone who now owns one thing no longer wishes to keep it: I want to sell my house in Chicago because I have a new job out of town. A rule of voluntary exchange allows the owner to get rid of something he has in order to acquire something to which he has greater value. In the ordinary case, these rules of exchange leave both parties to the transaction better off than they were before; otherwise they would not enter into them. The mutual benefit between the parties creates a presumption that the transfer in question is a social good, for someone is better off and thus far no one is worse off. But this presumption is not absolute. In turn it could be rebutted by a showing that the transfer has created negative effects on some third parties.

Here there is need to be careful, for every transfer has *some* negative external effects on the welfare of at least one third person. Nonetheless the overall effects of voluntary exchange will usually be positive. The increase in wealth of the immediate parties will generally increase the opportunities for exchange left open to all third parties. The disappointed competitor in the one case may well turn out to be the successful bidder in the next, so a system of property rights which facilitates free exchange is one that will in the long run work to the advantage of all its participants by increasing the amounts of available goods and services. In marriage markets, for example, no one would (I hope) think that A's decision to marry B and not C, could justify a system of regulation that would oust the principle of joint consent. The usual libertarian line has been that between competition and violence, and it is a very accurate proxy for which rules have, in the aggregate, third party effects that are overall negative or positive. In the absence of force, or the threat of force against third parties (Epstein 1985b), it is very difficult to rebut the original presumption that ordinary voluntary exchanges (unlike contracts to kill or steal) should go forward.

Voluntary exchanges are then a critical part of any sensible legal system. The question of whether these exchanges in fact can take place is, however, critically a function of the original design of a system of property rights. Here of course it is quite impossible for any human being or human institutions to engage in self-conscious acts of deliberation that will yield some perfect set of original rights or for that matter a perfect set of legal institutions. The line between violence and competition is, for example, a first approximation, one which leaves open the limited possibility that further corrections can

be made in the original allocation of rights should the circumstances require it: for example, some laws restricting the enforceability of cartel arrangements. The questions to be asked, therefore, are two: What rules will in general promote voluntary transactions? And what methods does the legal system have to "correct" those original allocations that turn out to be arguably wrong? The first of these questions addresses the mix of public and private property. The second addresses the role of the eminent domain principle and its analogue for public property, the public trust doctrine. The eminent domain rules govern the forced conversion of private to public property. Rightly understood, the public trust rules do the reverse, and govern the forced conversion of public to private property.

The Original Position

The first question is, why should some things be regarded as unowned in the original position and others subject to a common indivisible ownership? I believe that a single theory accounts for both types of ownership. In the original position property should be subject to that form of ownership that minimizes the bargaining problems associated with moving the asset to its highest-valued use. In most cases that proposition points to a system of private property, where a *single* person enjoys the right to the possession, use, and disposition of a given thing. The existence of a single owner means that normally one person is needed to sell, and only one to buy. Stated otherwise, two distinct people are the logically necessary minimum for any exchange to take place. The system of private ownership tends to ensure that any two people who choose to pair up are able to so act, without the consent of others.

This concern with voluntary exchanges helps explain the original distribution of rights to the person and many forms of real and personal property. With the person, that result is achieved under the traditional protection of individual autonomy, long associated with natural rights theory. Each person is the sole owner of himself, and hence can sell his labor without the consent of other individuals. Autonomy quite literally means capable of movement by the self—alone. There is no need in this view to have any rule which specifies how any person acquires ownership of himself; he has it by being in necessary possession of his own body: "every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands we may say are properly his." (Locke, ch. 5, ¶27).

No rule of original ownership for human talents could possibly operate at lower cost. Yet here too there are qualifications, for it is necessary to specify a guardian for individuals during infancy. Parents assume that role in part because they are in possession of the child at birth, and in addition have strong biological motives to protect the child until its maturity. The automatic selection of a very small number of guardians again facilitates the voluntary transactions entered into for the care and raising of the child.

With respect to land and chattels, there is no obvious assignment of any external things to any particular individual. In this context the first possession rule at common law allows persons to come forward and become single owners of external things (Epstein 1979). Once those things are reduced to single owners, they can then be disposed of in voluntary transactions that in the typical case involve two (or very few) persons. In both cases the distributional consequences of the first possession rule are distinctly secondary in importance. What matters is that resources with positive value not be left without any owners to fend for them, or with too many owners to squabble over them. In principle the entire process of assigning things to private ownership can take place, moreover, without the intervention of the extensive administrative state and its powers of centralized control. Initiation lies in the hands of private persons. The role of government is only to police the rules whereby ownership is acquired and transferred.

The desirability of this system of first possession changes radically when we consider, for example, the use of navigable rivers and lakes for transportation. Now any system of divided private ownership, based on first possession, tends to create the very bargaining and holdout problems that the institution of private property is designed to overcome. Each segment of the river is worth very little for transportation unless all segments could be subjected to uniform ownership. The risk is that the owner of one segment will hold out against all the others, so that bargaining breakdown will prevent any use of the river at all for navigation. It is precisely to overcome such difficulties that one of the most unproblematic uses of the eminent domain power has always been the condemnation of private lands for public highways, open to all. The formation of the highway removes, or at least controls, the risk of holdout which might otherwise dominate voluntary negotiations to lay out and construct roads.

If we need highways, then why is the land for public highways not owned by the public at large in the original position? The answer is quite simply this: while in the original position we know that there is some need for public highways, we do not know *where* they are

best located. That decision turns on subsequent events, including the pattern of land use development and the emerging routes for internal and external trade. The location of the highway involves some degree of discretion and must necessarily await future events. In the interim, private ownership of the underlying land facilitates its beneficial use. At some later time when the land is needed for the road, it can be condemned, where the requirement of compensation offers an effective way to constrain the state into making wise decisions about what lands should be taken (see Epstein 1985a, pp. 12–17).[2]

There is, however, no reason to wait for government action to dedicate navigable rivers to commerce. The location of the common highway is determined by nature. There is no need to begin with private ownership, and then to allow the property to be taken for public use upon payment of just compensation to private owners. So long as there is good reason to think that navigation along the river will be socially beneficial—an easy call—then the original recognition of navigation servitude prevents the blockade of the river by any single riparian or interloper. No system of eminent domain is costless to administer. Sometimes it is difficult to identify the owner of a particular asset; it is always tricky business to value their interests; and someone must levy and collect the taxes necessary to pay the needed compensation. The transactions costs are quite considerable. In contrast, the questions of which rivers are navigable, and what conduct counts as their obstruction can be answered by ordinary common law litigation. It is therefore possible to have a system of public ownership without an extensive government to administer it. The recognition of the public's navigation servitude in the original position ironically serves to *reduce* the size of government while recognizing the customary public ownership of public goods, which was firmly established if imperfectly justified.

There will of course be some difficult questions of how to define the limit of the scope of public ownership over navigable waters. The bilateral monopoly problem does not extend to all use of the

[2]Note in some cases cash compensation will not be needed, because the very presence of the highway will increase the value of the retained lands, so that each landowner's reduced holdings are worth more with the road in place than his larger holdings are worth without the road. Note too that the allocation of this surplus is nonetheless important. If there is no system of transfer payments after the highway is put in place, each owner will have an incentive to try to get the road located on the land of a neighbor, but adjacent to his own land. Requiring some fair division of the surplus created by the introduction of the road reduces this particular form of rent dissipation. In this context too there is a powerful correspondence between intuitive notions of fairness (that each person be treated equally) and the economic fear of rent dissipation.

waterways (see Rose 1986, p. 749). There is no reason to adopt a system that speaks of some inherent right of public access to navigable waters over private riparian lands. While there may be only a single navigable river, there can be many places where access to that river can be gained. Competition between landowners will keep the price of entry down, and if public access points are desired, then individual landowners can be compensated for the loss of their exclusive possession. Unless that is done, each riparian will be prepared to undertake steps to influence government powers to place public access ways over the lands of others. Requiring compensation reduces the costs of these wasteful games, while at the same time public officials face a budget and a taxing constraint whenever they wish to expand the scope of access.

Issues like fishing and bathing in navigable rivers are closer calls (Rose 1986, pp. 754ff.), but in the end these, unlike access rights, should probably be regarded as public. Once there is a guaranteed access to the river in question, it is hardly conceivable to think of effective ways to prevent persons on the river from using it for these purposes, and not obvious to imagine how a principle of first possession could reduce fishing and bathing rights across the board to private ownership.[3] It is very difficult to exclude persons from using navigable waters when they cannot be excluded from gaining access to it. Navigable rivers are therefore a mixed asset, some of whose attributes should remain private and others should be public. In sorting out the various cases, the guiding principle throughout should remain constant: choose that form of ownership that minimizes the expected number of bargaining breakdowns. The historical divisions between public and private rights often followed that general rule.

Nor Shall Public Property Be Transferred to Private Use, Without Just Compensation

The parallels between public and private property can be extended to the second of our inquiries, the correction of individual allocative mistakes. In dealing with private property, the system of ownership created under the rule of first possession will not always prove optimal. To be sure, private bargains can often work the needed reassignment of property rights. Yet in other cases, when the bargains must touch the rights of multiple owners, the parties face the very set of bargaining barriers that private ownership was designed to

[3]This is not to say that some form of regulation by the state will not in the end be necessary. Common fisheries present the obvious and classical common pool problem (see Hardin 1968).

avoid. The problems of the common fishery, of oil and gas, and even of bankruptcy are often taken as illustrations of cases where voluntary bargains are unable to correct allocative imbalances brought about in a system of private property based upon the principle of first possession.

In this world the use of government takings is thought to play an important role. The government takes property from private parties and pays them compensation, in cash or in kind, for what they have lost (Epstein 1985a, chaps. 14–15). The point of the system is that if the state can afford to pay the compensation for the losses that it imposes upon private owners, then there is good reason to believe that the entire set of coerced takings will benefit all (or virtually all) members of society simultaneously. The reason why compensation is strictly required is both prudential and universal. If takings could be made by state fiat alone, then, to avoid abuse, there would necessarily have to be elaborate administrative reviews to estimate, first, the value to the state of the property taken, and second, the losses the taking imposes upon the private owner. The taking should only go forward where the gains to the state (or the people it represents) exceed the losses that the taking imposes. But no administrative process is equal to that task. These investigations would be expensive to supervise, and in the end there would be little reason to have any confidence that only the "right" takings were undertaken by the state. The requirement of just compensation thus serves as an effective bulwark against government abuse by making public officials back up speech with dollars. Questions of the size of public gain are largely removed by judicial review, leaving the price feature as a powerful deterrent to unwise state action. If the court sets the price of the taking correctly, then there is some insistent legal pressure for public officials to estimate accurately the benefits from their own takings. Where the prices are set incorrectly (as when losses to good will are improperly ignored in the calculations), then there will be too many takings brought about by the state.

The analogous problem of correcting imbalances could also arise with property that is originally held by the public in common. Suppose some property which is given to the state is more valuable in private hands. The question is how does one determine what property that is, and transfer control over it to some private person. Initially the problem is complicated because property that has been customarily held in common cannot be disposed of by the (disorganized) public at large. Some group of persons must have the powe to dispose of it, and to control the use of the proceeds that has been so obtained. The need to transfer resources from state control is just

one reason why some organized system of collective ownership has been imposed upon public property. But whenever power is created, abuse may follow in its wake. The question is what rules, if any, should regulate those transactions that seek to move public property into private hands.

Two questions have to be addressed. The first is whether the transfer should be made, and the second is, when made, what level of compensation should be provided. The problem of disposing of public property thus raises the mirror image of public use and just compensation questions under the takings clause of the Fifth Amendment: "Nor shall private property be taken for public use, without just compensation." The underlying problems are not any simpler when dealing with property which was originally held by the public in common, for now the guiding principle is in a sense the converse of the original eminent domain clause, to wit: "No *public* property may be transferred to *private use*, without just compensation," payable to the public at large. This reverse eminent domain clause in turn reduces itself into the same two questions raised in the ordinary takings context, first, whether the state transfer should be made, and second, what compensation, if any, should be provided.

In dealing with the first of these issues, it is clear that the transfer is desirable only if it can improve the lot of everyone in society, that is, by the creation of general social improvement. In order for that conclusion to hold, there must be some reason to believe that the private owner of the asset can make better use of it than the public owner. In dealing with the navigation servitude over the river that conclusion does not seem very promising. Initially, any transfer of the navigable servitude to two or more persons, each entitled to do with his interest as he pleases, cannot have the desired effect, because it necessarily reintroduces the bilateral monopoly problems that the system of public ownership was designed to overcome.

In principle it might be possible to escape this problem by selling the navigation servitude to a single firm. But other problems remain. Surely the sale of the navigation rights limits the otherwise unlimited access to the public waters. In order to recoup the initial cost, the owner of the navigation servitude must charge a positive price to all users of the system—a price which will usually be in excess of the very low marginal cost that each additional user brings upon the system. And there would be a real skewing of benefits from privatization unless the new owner were required to accept *all* users at some nondiscriminatory price. The moment this condition of universal access is added, however, it becomes a doubtful question whether the navigation servitude has been really made private. The

insistence upon universal access impresses the public trust upon the navigation servitude even after legal ownership is vested in private hands. The absolute right to exclude, long thought the essence of private property, is denied the purchaser who takes, as it were, subject to the original public trust.

The theoretical gains from this type sale are, then, very hard to see. Yet its practical difficulties are very great. First, there are considerable costs associated with trying to organize a sale of so complex an asset as a navigable river. Who does the packaging of the rights and measures their value? Is it possible to really sell off the entire Mississippi river system from Minnesota to New Orleans? Unlike the case of highways, there is no obvious way to allow the new monopolist to limit the use of the river by riparian owners, who have previously had unlimited access to it. It is for good reason, then, that privatization has not come to the navigation servitude. The social gains just do not seem to be there.

At this point the parallels to the ordinary principles of eminent domain become explicit. When it is said that public rights over navigable waters are "inalienable," then the law in effect has applied by analogy the "public use" limitation of the ordinary eminent domain clause to property held by the public. If the transfer of the navigation servitude into private ownership *reduces* the levels of wealth (or utility), as seems likely here, then no system of side payments, no system of just compensation, can make all individuals better off than before when all gains and losses are taken into account. Someone has to bear the bottom line losses of the contemplated change in ownership rights. Under these circumstances, it is better therefore simply to prevent the transfer from taking place. Exactly that result is obtained by saying that public waterways are inalienable, and must remain, "inherently" public.

Yet in some situations, it seems clear that public ownership of resources is not necessarily a good thing. Consider the important case of minerals located in the riverbeds of navigable rivers. In the original position, it is arguably a close question of whether these should be treated as property held in common by the public at large, or as unowned resources subject to acquisition under the principle of first possession. On the one hand, private ownership of minerals does not create the same type of blockade situation that would arise with private ownership of a river or a lake. Yet by the same token, the removal of minerals from a riverbed may well require an extensive dislocation of transportation along the river, for surface easements are needed to mine. The dangers posed to navigation by unlimited private access to mineral rights over public waters are not

a trivial concern. Public ownership of the bed of the river and the mineral rights it contains avoids just that difficulty, and the general rule so provides (*Barney v. Keokuk*, 94 U.S. 324 [1876]).

Nonetheless it is doubtful that the public or the government has any natural advantage in the way in which it mines minerals. A system of ownership that treats the unorganized public as the owner of the minerals effectively withdraws them from gainful exploitation. The recognition that the state is the owner of these resources, in trust for the public at large, now endows a single group of individuals with the power to dispose of the minerals to private parties. The language of the public trust is far more than an idle metaphor because it is quite clear that the public officials in question cannot treat the proceeds of sale as their private property. Instead they are required to hold the moneys received as part of the public treasury, that is, for the benefit of all the individuals who had in the original position some undivided interests in the underlying mineral rights.

Some sales of public assets are for public benefit, but some are not. But which are which? Now attention has to be given to the question of what legal institutions will secure for members of the public at large the right price and the right terms for its asset. The first question raises the precise parallel to the "just compensation" requirement found in the eminent domain clause. If the transfer is simply made to private individuals without any restraint, there is the enormous temptation to use political influence and intrigue to divert public property to private hands. Requiring just compensation from the private acquirers of the mineral interests limits the possibility that the rights will be given away for a song, and strongly suggests that a competitive auction to maximize public revenues may be required as a constitutional matter.

This stringent compensation requirement, however, does not of itself answer the second question: What is the bundle of rights that the state itself should put up for auction? The problem is of great importance with minerals, where the structure of the access rights may alter the value of the navigation servitude that is retained. The pricing system is not able to handle this question because bids for the assets sold will not reflect the diminution in the value of the property rights retained by the public. Some form of administrative action is necessarily required. A division of power among various public officials is, accordingly, a necessary part of the program of any sale of public assets. That these additional steps are required should not be surprising. Private corporations often must confront the perils of self-dealing, and they take similar procedural precautions. If anything, the conflict of interest problem is far more acute with the

disposition of publicly held assets. Unlike the corporation situation, there is no systematic selection of individuals into the public venture based upon their common attitude toward risk, or their attitudes on consumption. Still every member of the public is a beneficiary of the public trust. Their fundamental divergence of opinions and attitudes only makes it more difficult to decide whether, and if so how, these public assets should be disposed of. The procedural safeguards are as much a part of the program for the disposition of public assets as the just compensation requirement.

Illinois Central Railroad v. Illinois

The above framework should make it possible to explain the enormous intellectual difficulties in that most important of the public trust cases, *Illinois Central Railroad v. Illinois* (146 U.S. 387 [1892]). The history of the case should be recounted in some detail. An Illinois statute of 1852 had given the Illinois Central Railroad permission to construct a line along the shore of Lake Michigan. That original grant was then confirmed in a statute of 1869. More controversially, the 1869 statute also granted to the Illinois Central Railroad title to extensive submerged lands in Lake Michigan, about 1,000 acres in all, including all of the outer harbor along Lake Michigan, and some additional submerged lands as well (146 U.S. at 454). The new grant provided that the railroad should hold title to the land in perpetuity, but should not have the power to grant, sell, or convey the fee, that is, outright ownership, therein to any other person. The state retained no express power to revoke the grant. Illinois Central was given the same freedom of control over the lands as if they were uplands, that is, lands not subject to the original navigation servitude. The grant also provided that Illinois Central could not "authorize obstructions to the harbor or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged" (id. at 451). In exchange for the conveyance of the land, Illinois Central agreed to carry over the compensation formula that the 1852 act used to set the moneys payable by the railroad to the state, and to pay some fraction of its gross earnings from its use, occupation, and control of the submerged lands in question. The 1869 grant, however, did not oblige the railroad to enter into any immediate efforts to make improvements on the lands so conveyed.

The entire arrangement under the 1869 statute was short-lived, for the original grant was revoked by new legislation, without compensation, four years later. In the interim period the Illinois Central had used some but not all of the waters conveyed to it for its railroad

business, but did not appear to pay any revenues to the state. The challenge made to the 1873 act was, when all was said and done, that the revocation of the 1869 act was an illegal taking. The railroad's case was that the grant of the submerged lands had conveyed an indefeasible title in the railroad in accordance with the terms of the grant. At that point the state could still revoke, but only if it paid compensation for the property so taken. Once the state conveyance is made the private title is as good as that which is acquired from any other source.

The argument for the state was that its original conveyance was in violation of the public trust under which those submerged lands had been held. As such at most a mere license was created by the 1869 act, so that an asserted legal title in the railroad was void (or at least voidable) at the option of the state. The upshot was that no compensation was required when the new legislature reversed the field of the old one.

The decision in the case was close, but the state prevailed by a four to three vote.[4] The opinion for the Court was written by Justice Stephen J. Field, normally a staunch defender of individual liberty and private property. (See, e.g., his powerful dissent in *Munn v. Illinois* 94 U.S. 113 [1877]). His refusal to uphold the original legislative grant has been taken to be inconsistent with his general philosophical position. On reflection I believe this is a mistake. In order to understand the case, it is necessary to apply the two-step analysis of public trust cases developed above.

The first question is whether the conveyance to Illinois Central is per se out of bounds because it necessarily is a losing proposition. However, it is hardly clear that the case falls into this category. The 1869 statute did not convey the entire lake itself to a private party. The use of Lake Michigan for navigation remains unimpaired, and the development of the harbor is consistent with the original use of the lake itself, for the grant itself prevented the railroad from obstructing navigation. In addition, there may be some efficiency gains in integrating the operations of the shipping and rail traffic. Finally, the risks that the railroad will abuse its position are reduced given that the state reserved powers to regulate its activities on the submerged lands. A categorical denunciation of the grant is hard to establish.

The question therefore turns on the second of the two issues identified above: Did the state receive just compensation from the private

[4]Two justices were disqualified: Chief Justice Melville Fuller because he had represented the City of Chicago, and Justice Blatchford who was a shareholder in Illinois Central Railroad.

party for the lands which it had conveyed out? In order to answer this question it is necessary to value the consideration received by the state for the submerged lands conveyed away.[5] By treating the question strictly as one of the capacity of the city to convey its submerged properties, Justice Field (and the dissent of Justice Shiras) did not explicitly address the compensation issue. But it is clear that this issue lies at the root of the case. Note, initially, there was no competitive bidding situation for the rights to the submerged land, and the price paid over was shrouded in mystery. Thus the 1869 statute called for the payment of $800,000 in installments to the city for the submerged lands, but the city comptroller refused to accept the first payment from the railroad if acceptance meant a waiver of the city's rights to challenge the grant. The remaining payments from the railroad were only conditional upon its receiving revenue from its development of the project in question. None (it appears) had been paid over in the interim four-year period that the statute had been in effect, and the railroad had complete control over the timing of any improvements that it chose to make. Clearly there are always conflicts of interest between the city and the railroad with the timing of improvements, and the 1869 act reduced the cost of delays to the railroad. Finally, the amount of land conveyed in the 1869 grant had been quite considerable in extent and value. It was as large as the docks along the Thames; much larger than those of Liverpool, and nearly as large as those of New York (id. at 454). The consideration for so substantial a grant should be quite considerable indeed.

In spite of its critical importance the just compensation issue was never addressed, except obliquely. Justice Field insisted that small grants of particular bits of waterfront for the development of piers and wharfs were well within the power of the state to grant. For this he was chided forcefully by the dissent of Justice Shiras, which said that if the state has the capacity to convey out bits and pieces of the waterfront, it could convey out the entire area at once. If the only issue had been the capacity to convey, then Shiras's objection would have seemed well grounded, but once the focus turns to the just

[5]There is also a second takings issue hidden in the case. If the moneys received by the "state" are paid into the state treasury, then there may well be an implicit transfer among citizens of the state. The citizens of Chicago are the obvious beneficiaries of the use of the submerged lands in Lake Michigan, but the proceeds of sale inure only in part to their benefit, with the remainder going to citizens downstate. The implicit wealth transfer between different segments of the public creates rent seeking opportunities. The public trust doctrine does not only address the opposition between the individual recipients of the trust property and the public at large, but also the parallel tensions between different members of the public. I shall, however, not pursue these issues further here.

compensation requirement, then the reverse is true. It is easier to monitor whether the state is getting fair value if it sells off small parcels for immediate use by competitive bid. It is far harder to measure compensation with the giant deal that was organized here. The clear sense of the Court's majority was that the city had been "ripped off" by the railroad which had gotten the advantage of a bargain purchase under the 1869 statute. Once that is done, then only complete nullification of the original grant will set the situation aright. Condemning the lands back again only allows the railroad to cash out a gain to which it was not entitled in the first instance.

It might of course have been possible for the railroad to place a different gloss on these facts. The railroad, for example, could have tried to show that the city's retained power of regulation over its wharves and piers eliminates the dangers of monopoly profits, and that the percentage of future revenues reserved under the grant are substantial in character. And even if the railroad does not have perfect incentives to develop the property, it surely has some, for the longer it keeps the waterfront in its undeveloped state, the longer it has to wait to realize a return from its asset. In his argument, the railroad's lawyer made explicit reference to the fact that the common council of Chicago gave its consent "on conditions that were extremely burdensome, but they have been fully complied with" (id. at 416).

At this distance it is extremely difficult therefore to make a judgment about how the adequacy of consideration issue should be ultimately resolved. Yet when all is said and done there is no denying its relevance. Suppose a private corporation sold all its assets to one of its shareholders. The risk of self-dealing is so great that the transaction could always be challenged by the remaining shareholders on the ground that the corporation had not received adequate compensation for the property it had distributed. *Illinois Central Railroad* raises that same issue of self-dealing in the public sphere. When Justice Field struck down the grant to the railroad, he acted not to restrict the power of ordinary conveyances, but to prevent the abuse of legislative power that might well have transpired. His position is thus consistent with his own theory of limited government, which everywhere places limitations on public officials that are not imposed upon private individuals.

Notwithstanding the internal logic of Field's opinion, there are many disquieting elements about *Illinois Central,* both at an institutional and a constitutional level. As an institutional matter, it is surely a source of some disquiet that the case was finally resolved only 19 years after the 1873 statute. That delay works in no one's interest, for in the interim neither the city nor the railroad knows whether it is in a position to develop the land. The time to resolve

doubts about public grants is before, or shortly after, they are made. In part this can be done by procedural protections. Public hearings about the terms and conditions of the grant, its costs and its benefits, seem clearly appropriate before the grant is made. Such deliberations are held before corporations sell substantial assets to shareholders.

There is, however, no certainty that these will be sufficient. The question therefore is what types of judicial challenges can be made to set aside the grant. *Illinois Central* reached the courts only because the subsequent legislature revoked the earlier grant, without paying compensation. But why should the grant remain beyond challenge if it is not revoked? The underlying fear is both familiar and recurrent: the first legislature has been bought off. If so, then the next legislature could be bought off as well. To condition challenge to the grant on its repeal means that in some cases needed challenges will never take place. *Any* citizen should have standing to challenge a major transfer of public assets. What seems to be called for is a system which allows a prompt (if that word can ever be used about the judicial system) challenge to the original grant on grounds of inadequacy, as by declaratory judgment. But the fuse should be short, and once the period has passed, the grant should be regarded as fully valid, and not subject to subsequent attack in any forum. Its future revocation would then require compensation.

Constitutional Issues

The constitutional issues raised by *Illinois Central* are, if anything, more puzzling. The public trust doctrine is the mirror image of the eminent domain clause. Both are designed to place limitations upon the power of legislature to divert property, whether held privately or in common, from A to B, or more generally from a group of As to a group of Bs. Both doctrines derive from a strong sense of equity that condemns these uncompensated transfers as a genteel form of theft, regardless of whether the original holdings are public or private. In each case the prohibition upon legislative behavior has beneficial allocative consequences as well, because it prevents the dissipation of valuable resources that are used to obtain or resist uncompensated transfers. In principle the public trust doctrine should operate at the constitutional level, as a parallel to the eminent domain clause. Nonetheless the basis for the public trust doctrine in the United States Constitution is difficult to identify.[6]

[6]Many state constitutions have specific public trust provisions in them. See, e.g., Montana Constitution, Art. 9, §3(3), which provides:

> All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law.

Consider the way the public trust question arose in *Illinois Central.* That action was brought by the railroad to challenge the revocation of the original grant under the 1873 statute. The railroad claimed that the earlier conveyance had made the submerged lands its private property, protected against the confiscation by any government action. If the railroad did indeed own the lands, then its case was airtight. Accordingly the state's defense rested on the proposition that the original grant was invalid under the public trust doctine. The public trust question was thus raised by indirection only. At this point, the juridical status of the public trust doctrine in the legal hierarchy becomes critical to the analysis. If the doctrine applied only at common law, then the state legislature could trump it. If the principle were embodied only in the Illinois constitution, then the case should not be heard in the U.S. Supreme Court. If the public trust principle found its application in the U.S. Constitution, then Justice Field should have said where. But the opinion is not "clause-bound" (see Ely 1980) in any sense at all. Instead Field works very much in the "natural" or "higher" law tradition (see Grant 1931). *Illinois Central* contains no citations to particular constitutional provision, and the opinion reads like an essay that runs for 20 pages without case citation (146 U.S., at 436 to 456).

It is therefore an open question whether the public trust doctrine has a constitutional home. Here two alternatives present themselves, each with its own interpretative difficulties. The first is the standard due process clause of the Fourteenth Amendment: "Nor shall any State deprive any person of life, liberty, or property, without due process of law." There is a long but an uneasy tradition that reads the last phrase, "without due process of law" to be the equivalent of "without just compensation" (*Chicago, Burlington & Quincy Railroad Co. v. Chicago,* 166 U.S. 226, 236 [1896]). On that substantive reading, the due process clause seems to apply because the "property" to which it refers includes not only private property, but also the fractional share that each person holds in the trust property. At this point the outcome in *Illinois Central* depends upon the adequacy of consideration received by the state, just as this due process analysis appears to provide.

The second possible source of constitutional rights is the equal protection clause, which provides that no state shall "deny any person within its jurisdiction the equal protection of the laws." Unlike the due process clause, this clause is not tied to the protection of any particular interest in property, public or private. The modern law of equal protection confers upon the states a massive degree of discretion for dealing with property and other economic issues (*Minnesota*

v. Clover Leaf Creamery Co., 449 U.S. 456 [1981]) because such is not regarded as either a "fundamental right" like voting (*Harper v. Virginia State Board of Elections*, 383 U.S. 663 [1966]); or a "suspect classification" like race (see *Brown v. Board of Education*, 347 U.S. 483 [1954]). Neither gloss on the clause, however, appears to be compelled by the text, or even consistent with its general language. The principle of equal protection is stated in universal terms: *no state* shall deny *any person* equal protection of the laws. Accordingly the clause seems to prohibit any invidious classification that the state makes among its citizens, wholly without regard to fundamental right or suspect classification.

Viewed in this expanded light, the public trust cases appear to fall under the clause. When property is conveyed out of public trust for inadequate consideration, some citizens receive disproportionate benefits, while others receive disproportionate losses. The uncompensated transfer of public property to private use thus disadvantages some at the expense of others. Those who have come up short under the transfer have been denied the equal protection of the law. Success or failure under the equal protection clause thus turns on the presence or absence of compensation when property rights are taken. This close connection between disproportionate impact and just compensation is not simply invented for the occasion. It is quite explicit in the ordinary eminent domain cases. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49 [1960]; Epstein 1985a, pp. 204–9). This "equal protection" dimension of the eminent domain problem arises with equal force in the public trust cases as well. The net losers under the transfer have not received equal protection of the law.

Conclusion

The preceding discussion has examined the public trust doctrine in the area of its birth. In closing it is worth asking how far the doctrine can be extended. From the above arguments the scope should be broad indeed. So long as one deals with property which is held by the people in common in the original position, then its disposition is governed by the public trust doctrine as formulated in *Illinois Central*. Some sense of the sweep of the doctrine is captured by

Professor Sax (1970, p. 566) in his early and influential treatment of the subject:

> It is clear that the judicial techniques developed in public trust cases need not be limited either to these few conventional interests [e.g. rivers, streams or parklands] or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals.[7]

The source of the danger is evident. Well-organized political groups may well be able to obtain net transfers from legislation. As such the connection between the defects of the political process and the public trust doctrine is as explicit as the connection between the defects of the political process and the eminent domain clause (Epstein 1985a). As the takings clause, in my view, reaches all forms of taxation and regulation, it should not be surprising that the public trust doctrine has a similar scope.

The closeness of the public trust doctrine and the eminent domain power can be shown in yet another way. Thus far the inquiry has taken place on the assumption that all property held by the public was acquired by it in the original position. That assumption is clearly false in the modern setting, where enormous amounts of property held on the public account have been acquired by either purchase (with tax dollars) or condemnation. With respect to property so acquired the eminent domain principle and the public trust principle now converge. The two principles impose identical limitations on the disposition that public officials can make of public property. The nature of the limitations could be quite substantial, and it might be appropriate in closing to mention a few illustrations of their reach. Assume that land has been condemned for use as a public highway. If it is thereafter held in public trust, then it is highly questionable whether the state may allow some individuals free access to the highways which it denies to others. There is thus serious doubt as to whether the state can issue licenses for commercial transportation to some firms, while denying those licenses to others. At the very least it should be required to sell those licenses in a competitive market, so that the gain from the license remains with the public at large. The elaborate prerogatives of licensing bus and taxi services on a favored basis is more than nettlesome. It is an impermissible diversion of public assets to some persons to the exclusion of others.

[7]Sax then adds rights of way for utilities, wetland regulation, and air pollution to the list of questions. But the comprehensive scope of the theory goes further.

The same point of course applies with respect to exclusive franchises over public waters. The great case of *Gibbons v. Ogden* (22 U.S. [9 Wheat.] 1 [1824]), for example, involved a grant by the state of New York to Livingston and Fulton of the exclusive right to run steamships in New York Harbor. The grant was held to be invalid because it was preempted by federal statutes enacted pursuant to the power of Congress to regulate commerce among the several states. If the analysis above is correct, exclusive grants of that sort are improper diversions of public resources under the public trust, even if authorized by Congress. There is little reason to believe that a system of monopoly control promises superior social results to one of free entry, and in any event, there was no evidence that Livingston and Fulton paid full value for the franchise that they so acquired.

Over a broad range of cases, then, the public trust and the eminent domain theory impose in principle parallel restrictions upon the application of government power, no matter what the original distribution of rights. This is as it should be, for a comprehensive theory of governance should be able to account for all forms of government control of property, regardless of whether that property is public or private in the original position.

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Chief Justice Ronald Castille, the Pennsylvania Supreme Court and State Constitutional Law

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Chief Justice Ronald Castille, the Pennsylvania Supreme Court and State Constitutional Law*

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I. INTRODUCTION

> Citing this Court's decision in *Commonwealth v. Edmunds* . . . Pap's accurately notes that, on questions sounding under our state charter, this Court is not bound by decisions of the U.S. Supreme Court on similar federal provisions, but may find that Pennsylvania provides greater protection for individual rights. *See Edmunds* . . . ("we are not bound by the decisions of the United States Supreme Court which interpret similar (yet distinct) federal constitutional provisions"). Pap's further notes that this Court already has recognized that our Declaration of Rights was the "direct precursor of the freedom of speech and press," *see Edmunds* . . . and that this Court has long construed the freedom of expression provision in [a]rticle I, § 7 as providing greater protection of expression than its federal counterpart. Pap's adds that other states also have provided greater protection for expression under their state charters than has been afforded by the U.S. Supreme Court under the First Amendment.
>
> Justice Ronald Castille[1]

I would like to thank Dean Ken Gormley of Duquesne University School of Law for his kind invitation to participate in the celebration of Chief Justice Ronald Castille's retirement from the Supreme Court of Pennsylvania, the oldest state high court in the United States.[2] I suppose one might ask what business a law professor teaching in New Jersey has commenting on Chief Justice Castille and the Supreme Court of Pennsylvania. I have been a student of the Pennsylvania Supreme Court since I began teaching at Rutgers-Camden Law School, across the river from Pennsylvania, thirty-five years ago. I have argued two cases before the court (losing them both),[3] have written about the court fairly extensively,[4] the court

1. Pap's A.M. v. City of Erie, 812 A.2d 591, 601 (Pa. 2002); *see infra* notes 14–33 and accompanying text.

2. Ken Gormley, *Foreword: A New Constitutional Vigor for the Nation's Oldest Court*, 64 TEMP. L. REV. 215 (1991).

3. Local 22, Phila. Fire Fighters' Union v. Commonwealth, 613 A.2d 522 (Pa. 1992); Ritter v. Commonwealth, 548 A.2d 1317 (Pa. Commw. Ct. 1988), *aff'd per curiam*, 557 A.2d 1064 (Pa. 1989).

4. *See, e.g.*, Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541 (1989); *State Constitutional Limits on Legislative Procedure: Problems of Judicial Enforcement and Legislative Compliance*, 48 U. PITT. L. REV. 797 (1987); *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to State Constitutional Equality*

has even cited my work on occasion,[5] and, possibly most important, my wife Alaine S. Williams has practiced extensively before the court for many years.[6] Perhaps these factors provide me with the "street creds" to make the following comments.

My topic is to review some of the leading state constitutional opinions written by Chief Justice Castille, and to draw from them some larger, sometimes national, lessons on the current subject of state constitutional law. I will review both cases dealing with state constitutional rights and state constitutional separation/distribution of power.

Many cases involving *state* constitutional rights will also involve *federal* rights claims. In such situations, our American constitutional rights regime provides a "dual" system of protection for citizens.[7] State constitutional rights provisions may actually provide more protection than their federal counterparts, which provide a national minimum standard of rights. By contrast, in separation-of-powers cases, there are no minimum *federal* standards[8] such as in rights cases, so there should not be any concern about federal constitutional analysis when a state court resolves its state constitutional separation of powers cases.[9]

II. INDEPENDENT RIGHTS UNDER STATE CONSTITUTIONS: CASES WITH BOTH FEDERAL AND STATE CONSTITUTIONAL CLAIMS

A. State Constitutional Rights

All state constitutions contain rights guarantees that are often identical or similar to, but sometimes quite different from, the more

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Doctrine, 3 WIDENER J. PUB. L. 343 (1993) [hereinafter *State Constitutional Equality Doctrine*].

5. Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 408 (Pa. 2005); Safe Harbor Water Power Corp. v. Fajt, 876 A.2d 954, 973 n.16 (Pa. 2005); City of Phila. v. Commonwealth, 838 A.2d 566, 586 n.18, 588–89 (Pa. 2003); Stlip v. Hafer, 718 A.2d 290, 295 (Pa. 1998) (Newman, J., dissenting); Pa. State Ass'n of Jury Comm'rs v. Commonwealth, 64 A.3d 611, 615 n.9 (Pa. 2013); *In re* Bruno, 101 A.3d 635, 660 n.13 (Pa. 2014); Robinson Twp v. Commonwealth, 83 A.3d 901, 944 n.33 (Pa. 2013) ("Of note among academic commentary on state constitutionalism, especially regarding Pennsylvania's decisional law, is the work of Professor Robert F. Williams.").

6. *See, e.g.*, Council 13, AFSCME *ex rel.* Fillman v. Rendell, 986 A.2d 63 (Pa. 2009); *see also infra* notes 87–94 and accompanying text; Ziccardi v. Commonwealth, 456 A.2d 979 (Pa. 1982); Odgers v. Commonwealth, 525 A.2d 359 (Pa. 1987); City of Phila. v. District Council 33, AFSCME, 598 A.2d 256 (Pa. 1991); Office of Att'y Gen. v. Council 13 AFSCME, 844 A.2d 1217 (Pa. 2004).

7. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 114 (Oxford Univ. Press 2009).

8. *Id.* at 240.

9. *Id.* at 240–42.

familiar federal constitutional rights. The Declarations of Rights in the constitutions of the original states such as Pennsylvania predated the Federal Bill of Rights, and served as models not only for other states,[10] but for the Federal Bill of Rights itself.[11] How such state constitutional rights guarantees should be interpreted in cases that also raise federal constitutional claims has been one of the most important areas of state constitutional law for several generations now. This phenomenon is referred to as the New Judicial Federalism.[12] The Pennsylvania Supreme Court has been a leader in this movement.[13]

1. Nude Dancing as Protected Expression

In 1998, the Pennsylvania Supreme Court was presented with the question of whether nude dancing at a club in Erie was constitutionally protected free expression such that the city ordinance banning it was unconstitutional.[14] The challenge to the ordinance was based on both the Federal First Amendment and the Pennsylvania Constitution's free speech and expression guarantee.[15] The majority of the court ruled that the city ordinance violated the Federal First Amendment.[16] Then-Justice Castille concurred, arguing that in all likelihood the city ordinance would not violate the First Amendment, but concluded it must be struck down under the Pennsylvania Constitution's free speech and expression guarantee.[17] Justice Castille saw the state constitution's provision as broader and more protective than the federal guarantee:

> Although I believe that Sections 1(c) and 2 of the Ordinance at issue here do not fail under the First Amendment in light of *Barnes*, I nevertheless concur in the result reached by the majority since I believe that those provisions must be stricken under [a]rticle I, § 7 of the Pennsylvania Constitution, which provides: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely

10. Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Centennial Celebration*, 80 KY. L.J. 1, 5 (1990–91).

11. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 53–54, 85–86, 90–91 (1977).

12. WILLIAMS, *supra* note 7, at 113.

13. KEN GORMLEY, *State Constitutional Law: The Building Blocks*, *in* THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 17 (2004).

14. Pap's A.M. v. City of Erie (*Pap's I*), 719 A.2d 273 (Pa. 1998).

15. *Id.* at 276.

16. *Id.* at 280.

17. *Id.* at 281 (citing PA. CONST. art. I, § 7.).

> speak, write and print on any subject, being responsible for the abuse of that liberty . . ." Pa. Const. art. I, § 7. This Court has repeatedly determined that [a]rticle I, § 7 affords greater protection to speech and conduct in this Commonwealth than does its federal counterpart, the First Amendment.
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> I believe that the dissent authored by Justice White in *Barnes* is persuasive and that this Court should adopt it for purposes of interpreting [a]rticle I, § 7 of the Pennsylvania Constitution.[18]

Because the majority opinion in *Pap's I* was based on the U.S. Constitution, this decision was not based on an "adequate and independent state ground."[19] Therefore, the United States Supreme Court would have jurisdiction and might accept the case and decide the federal constitutional question. This is exactly what happened.[20]

2. *United States Supreme Court Accepts Jurisdiction and Reverses*

The U.S. Supreme Court, as Justice Castille had predicted, determined the matter was not moot,[21] and reversed the Pennsylvania

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18. *Id.* at 283. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result,* 35 S.C. L. REV. 353, 375–76 (1984) ("It is now becoming clear that Supreme Court dissenting opinions may influence the legislative branch or state courts as well as current or future Court majorities. That is, Supreme Court dissents can and do have a significant impact upon state courts confronting the same constitutional problem the dissenter believes the Court decided incorrectly. In this sense, state courts have become a new audience for Supreme Court dissents on federal constitutional questions that may also arise under state constitutions. Thus, dissenters may be vindicated more quickly, but only on a state-by-state basis. One might ask, then, whether Justice Brennan's and Marshall's dissents, among others, have not enjoyed a much higher vindication rate in state cases than Holmes ever achieved in later Supreme Court decisions."). For an argument that Justice Brennan's approach does not serve the interests of federalism, see Earl Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988). *Contra* Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763 (1998). Justice Brennan made the point about the possible influence of Supreme Court dissents in developing state constitutional law. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

19. Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision"); *see* GORMLEY, *supra* note 13, at 26; WILLIAMS, *supra* note 7, at 122–25.

20. City of Erie v. Pap's, 526 U.S. 1111 (1999) (granting certiorari).

21. Pap's A.M. v. City of Erie, 527 U.S. 1034 (1999) (Pap's had discontinued nude dancing).

Supreme Court's decision in *Pap's I*.[22] The U.S. Supreme Court's decision was deeply divided, with no majority opinion.[23] Of course, the U.S. Supreme Court does not have jurisdiction to decide *state* constitutional questions, so the Court remanded the matter to the Pennsylvania Supreme Court.[24]

Under these circumstances, where the United States Supreme Court's decision may decide only federal constitutional questions, and not their state counterparts, and because we have a "double source of protection" in our federal system, state courts are not required to interpret their state constitutions in "lockstep" with federal constitutional interpretations.[25] This is particularly true because when the United States Supreme Court interprets the Federal Bill of Rights against the *states*' it must consider the fact that it is setting rules for all fifty states, and may possibly be establishing a "least common denominator" of rights because of a form of deference or "federalism delusion."[26]

3. *Pennsylvania Supreme Court Strikes Down City Ordinance under State Constitution*

On remand from the United States Supreme Court, in *Pap's II*, the Pennsylvania Supreme Court reinstated its decision striking down the Erie ordinance, but this time based the decision on the state constitution, in an opinion by Justice Castille.[27] Justice Castille agreed that the case was not moot,[28] and began with the structured state constitutional analysis established by the landmark decision, *Commonwealth v. Edmunds*.[29] This mandated an approach to analyzing whether state constitutional rights guarantees should be interpreted more broadly or protectively than their federal constitutional counterparts. This approach is not applied in an ironclad way by the Pennsylvania Supreme Court, but it does serve to

22. Pap's A.M. v. City of Erie, 529 U.S. 277 (2000).
23. *Id.* at 281.
24. *Id.* at 302.
25. WILLIAMS, *supra* note 7, at 113–14.
26. *Id.* at 173–74; *see infra* notes 30 and 51.
27. Pap's A.M. v. City of Erie (*Pap's II*), 812 A.2d 591 (Pa. 2002).
28. *Id.* at 599–601. Both parties agreed, as did Chief Justice Castille, that the United States Supreme Court's mootness analysis was not binding on the state court, and he evaluated the issue of mootness under the Pennsylvania Constitution. See also Justice Castille's opinion in *Stilp v. Commonwealth General Assembly*, 940 A.2d 1227, 1231–35 (Pa. 2007), finding no taxpayer standing; *see generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking The Judicial Function*, 114 HARV. L. REV. 1833, 1852–68 (2001); WILLIAMS, *supra* note 7, at 298–99.
29. *Pap's II*, 812 A.2d at 603 (citing Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)).

discipline lawyers and the court when it is deciding whether to "diverge" from the United States Supreme Court.[30]

Justice Castille indicated that the Pennsylvania Constitution's freedom of expression provision predated the First Amendment and was broader (stating the right *affirmatively* rather than *negatively*).[31] He reviewed the special meaning of freedom of expression in Pennsylvania history, noted that federal law in this area was quite unclear and still in a state of flux, and emphasized that the Pennsylvania Supreme Court would be deciding for only the Commonwealth, rather than the nation as a whole.[32] Further, he relied on the reasoning of the dissenting opinions in the U.S. Supreme Court.[33]

These are all the kinds of arguments that courts take into account when trying to determine whether they should "diverge" or "go beyond" what the United States Supreme Court has said about federal constitutional rights. Chief Justice Castille took these arguments seriously in deciding whether to "disagree" with the United States Supreme Court.

B. Search and Seizure

Chief Justice Castille has written a number of decisions dealing with search and seizure, all of which are characterized by state constitutional analysis that is independent of the United States Supreme Court's interpretation of the Federal Fourth Amendment. Search and seizure is one of the most common areas of litigation

30. Both Dean Gormley and I have written on *Edmunds*, he more favorably than I. *Compare* GORMLEY, *supra* note 13, at 1, 3–16 *with* WILLIAMS, *supra* note 7, at 155–57, 169–77. I have expressed concern that this "criteria approach" can give an unnecessary "presumption of correctness" to United States Supreme Court decisions interpreting a different constitution under circumstances where it must be concerned with all fifty states and therefore its decisions might be diluted by federalism concerns. *See* WILLIAMS, *supra* note 7 and accompanying text.

31. *Pap's II*, 812 A. 2d at 603 ("The text of the First Amendment of the [F]ederal Constitution provides, in relevant part, that, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .' U.S. CONST. amend. I. As a purely textual matter, [a]rticle I, § 7 is broader than the First Amendment in that it guarantees not only freedom of speech and the press, but specifically affirms the 'invaluable right' to the free communication of thoughts and opinions, and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused. 'Communication' obviously is broader than 'speech.'").

32. *Id.* at 603–05, 611 ("The provision is an ancestor, not a step-child, of the First Amendment.").

33. *Id.* at 599, 602; *see also supra* note 18 and accompanying text.

where lawyers and state courts have looked to their own state constitutions.[34] In this area, by contrast to freedom of expression, Chief Justice Castille has tended to reach the same conclusions as the United States Supreme Court in similar search and seizure cases. This has been true for more than fifteen years.[35] In each of these decisions Chief Justice Castille applied the *Edmunds* analysis. This has been referred to as "reflective adoptionism," where the state court acknowledges that it may render a more protective decision under the state constitution, analyzes that option, but concludes that it should reach the same conclusion as the United States Supreme Court.[36]

For example, in *Commonwealth v. Russo*,[37] the question was whether a Pennsylvania statute authorizing Game Commission officers to enter land without a warrant[38] violated either the Fourth Amendment or article I, section 8 of the Pennsylvania Constitution. Then-Justice Castille, writing for the majority of a divided court, considered whether the United States Supreme Court's "open fields doctrine," should be applied under the Pennsylvania Constitution.[39] Game Commission officers had entered the defendant's property without a warrant after a tip that he had "baited" his property for the purpose of hunting bears. Justice Castille carefully evaluated the United States Supreme Court decisions,[40] and concluded:

> There can be no question that the search *sub judice* was lawful under the Fourth Amendment, given the open fields doctrine. The issue, however, is whether Pennsylvania has departed, or should depart, from that doctrine when applying [a]rticle I, [s]ection 8 of our Constitution. To determine whether the open fields doctrine as enunciated in *Oliver* is consonant with [a]rticle I, [s]ection 8, we will undertake an independent analysis of that provision as guided by our seminal decision in *Commonwealth v. Edmunds* . . . .[41]

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34. Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L. REV. 225 (2007); GORMLEY, *supra* note 13, at 23; David Rudovsky, *Searches and Seizures*, in GORMLEY ET AL., *supra* note 13, at 299.

35. Commonwealth v. Williams, 692 A.2d 1031 (Pa. 1996); Commonwealth v. Glass, 754 A.2d 655 (Pa. 1999); Commonwealth v. Russo, 934 A.2d 1199 (Pa. 2007); Commonwealth v. Duncan, 817 A.2d 455 (Pa. 2013).

36. WILLIAMS, *supra* note 7, at 197–200.

37. 934 A.2d 1199 (Pa. 2007).

38. 34 PA. CONS. STAT. § 901(a)(2).

39. *Id.*; *see also Russo*, 934 A.2d at 1200.

40. *Russo*, 934 A.2d at 1203–05.

41. *Id.* at 1205; *see* Rudovsky, *supra* note 34, at 306–07.

As indicated, Justice Castille provided a detailed analysis of the *Edmunds* factors, and concluded that Pennsylvania constitutional law in this area should mirror that under the Federal Constitution:

> In short, the baseline protections of the Fourth Amendment, in this particular area, are compatible with Pennsylvania policy considerations insofar as they may be identified. More importantly, there is nothing in the unique Pennsylvania experience to suggest that we should innovate a departure from common law and from federal law and reject the open fields doctrine.[42]

Three Justices dissented, primarily by evaluating the *Edmunds* factors differently from Justice Castille.[43]

In a recent 2014 decision,[44] Chief Justice Castille followed an earlier decision rejecting the United States Supreme Court's "good faith exception" to the exclusionary rule.[45] While expressing some misgivings about the court's earlier precedent,[46] he adhered to it.[47]

C. Excessive Fines

In 2014, Chief Justice Castille authored the majority opinion in *Commonwealth v. Eisenberg*,[48] striking down a gambling statute's mandatory minimum fine of $75,000 for a first offense, as contrary to the Pennsylvania Constitution's cruel punishments clause.[49]

He first reviewed the history of the provision, dating from 1776, together with its judicial interpretation.[50] Notably, in a challenge to an excessive *sentence* a year earlier (where the state constitutional claim was not adequately raised and argued), Chief Justice Castille had concurred in the court's federal constitutional analysis, but stated:

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42. *Id.* at 1213; *see also* Commonwealth v. Williams, 692 A.2d 1031, 1038–39 (Pa. 1996).
43. *Williams*, 692 A.2d at 1213–18. I have observed this phenomenon in other states that apply what I have called the "criteria approach." WILLIAMS, *supra* note 7, at 168 (noting that the "[m]ajority and dissent here focus on their disagreement on the application of the criteria rather than on the content and application of the state constitutional provision at issue. Is a dissenter's accusation that the majority has misapplied the criteria any different from an accusation that the majority has simply resorted to the state constitution in a result-oriented attempt to 'evade' U.S. Supreme Court precedent?").
44. Commonwealth v. Johnson, 86 A.3d 182 (Pa. 2014).
45. *See* United States v. Leon, 468 U.S. 897 (1984).
46. *Johnson,* 86 A.3d at 189 n.4.
47. *Id.* at 191; *see also* Theodore v. Del. Valley Sch. Dist., 863 A.2d 76, 88–96 (Pa. 2003).
48. 98 A.3d 1268 (Pa. 2014).
49. *Id.* at 1287 (citing PA. CONST. art. I, § 13).
50. *Id.* at 1279–83.

> There is a colorable claim to be made that the federal test for gross disproportionality should not be followed lockstep in Pennsylvania, certainly at least insofar as it includes a *federalism-based constraint* that looks to sentences for similar offenses in other states . . . [A] defendant pursuing a Pennsylvania sentencing disproportionality claim may allege that comparative and proportional justice is an imperative within Pennsylvania's own borders, to be measured by Pennsylvania's comparative punishment scheme. In that circumstance, it may be that the existing Eighth Amendment approach does not sufficiently vindicate the state constitutional value at issue, where sentencing proportionality is at issue.[51]

In the *Eisenberg* context of excessive *fines*, Chief Justice Castille concluded for a unanimous court:

> In our view, the fine here, when measured against the conduct triggering the punishment, and the lack of discretion afforded the trial court, is constitutionally excessive. Simply put, appellant, who had no prior record, stole $200 from his employer, which happened to be a casino. There was no violence involved; there was apparently no grand scheme involved to defraud either the casino or its patrons. Employee thefts are unfortunately common; as noted, appellant's conduct, if charged under the Crimes Code, exposed him to a maximum possible fine of $10,000. Instead, because appellant's theft occurred at a casino, the trial court had no discretion, under the Gaming Act, but to impose a minimum fine of $75,000—an amount that was 375 times the amount of the theft.[52]

D. Protection of Reputation

The United States Constitution, as interpreted by the United States Supreme Court provides no protection for a person's reputation.[53] By contrast, in Pennsylvania, the constitution contains a textual protection for reputation:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those

51. Commonwealth v. Baker, 78 A.3d 1044, 1055 (Pa. 2013) (Castille, C.J., concurring) (emphasis added). *See supra* note 26 and accompanying text.

52. *Eisenberg*, 98 A.3d at 1285.

53. Siegert v. Gilley, 500 U.S. 226, 234 (1991).

> of enjoying and defending life and liberty, of acquiring processing and protecting property and *reputation*, and of pursuing their own happiness.[54]

In *Castellani v. Scranton Times, L.P.*,[55] a defamation action was brought against a newspaper and reporter by persons who were accused in newspaper articles of impeding the work of a grand jury, a criminal offense.[56] In response to the defense raised under the Pennsylvania Shield Law,[57] the plaintiffs argued for a "crime-fraud" exception to the statute, along with their reliance on the constitutional protection for their reputation.[58] Chief Justice Castille, for a divided court, upheld the Shield Law defense, but specifically acknowledged the importance of the constitutional right to protection of reputation:

> Our holding does not discount the important interests implicated in every defamation action, notably, the individual's fundamental right to his or her reputation as guaranteed under the Pennsylvania Constitution. The proper balance between that compelling interest and the Shield Law, however, was already struck by this Court in *Hatchard* when it refined our interpretation of the Shield Law. [59]

III. GOVERNMENT STRUCTURE UNDER STATE CONSTITUTIONS

A. Introduction

Notably, in the area of state constitutional government structure, by contrast to state constitutional rights, there are virtually no minimum standards or "least common denominators" imposed by the Federal Constitution on the states.[60] It is true that the Guarantee Clause[61] requires states to have a "republican form of government," but the United States Supreme Court has deemed this nonjusticiable.[62] Consequently there need not be any specific influence from

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54. PA. CONST. art. I, § 1 (emphasis added); s*ee generally* Elizabeth Wachman & Ken Gormley, *Inherent Rights of Mankind*, *in* GORMLEY ET AL., *supra* note 13, at 84.
55. 956 A. 2d 937 (Pa. 2008).
56. *Id.* at 939–41.
57. 42 PA. CONS. STAT. § 5942.
58. *Castellani*, 956 A.2d at 939, 942.
59. *Id.* at 953 (citing Hatchard v. Westinghouse Broad. Co., 532 A.2d 346, 348–51 (Pa. 1987)). Justice McCaffery dissented on the basis of article I, section 1. *Id.* at 954.
60. WILLIAMS, *supra* note 7, at 240–42. *See also supra* notes 7–8 and accompanying text.
61. U.S. CONST. art. IV, § 4.
62. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150 (1912).

the United States Supreme Court's interpretations of federal separation/distribution of powers questions.[63] State constitutions reflect a fairly wide variety of arrangements such as elected versus appointed judiciaries, plural as opposed to unitary executives, and even one unicameral legislature.[64] That said, there are not any wide disparities such as the establishment of a parliamentary system of state government.[65]

B. Reapportionment and Redistricting

One of the most politically and legally contentious elements of state government constitutional structure is the internal reapportionment and redistricting of the state legislature.[66] In *Holt v. 2011 Legislative Reapportionment Commission*,[67] Chief Justice Castille confronted the extremely complex interaction of the 1960's federal constitutional one-person-one-vote mandate and the state constitutional requirements for the structuring of legislative districts. He provided a deep analysis of the evolution of reapportionment and redistricting litigation in Pennsylvania, both before and after the one-person-one-vote requirement from the United States Supreme Court. He noted that the state constitutional requirements were still applicable, if they could be enforced within the supreme federal mandate.[68] Chief Justice Castille noted:

> The operative mandates under [a]rticle II, [s]ection 16 are to devise a legislative map of fifty senatorial and 203 representative districts, compact and contiguous, as nearly equal in population "as practicable," and which do not fragment political subdivisions unless "absolutely necessary." Although all of these commands are of Pennsylvania constitutional magnitude, one of the factors, that districts be "as nearly equal in population as practicable," also exists as an independent command of federal constitutional law, including decisional law which changes and evolves.[69]

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63. WILLIAMS, *supra* note 7, at 240–41.
64. NEB. CONST. art. III, § 1.
65. *See* Jonathan M. Zasloff, *Why No Parliaments in the United States?*, 35 U. PENN. J. INT'L LAW 269 (2013).
66. *See* James A. Gardner, *Foreword: Representation Without Party: Lessons From State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881 (2006); David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions*, 37 RUTGERS L.J. 1087 (2006).
67. 38 A.3d 711 (Pa. 2012).
68. *Id.* at 759–60.
69. *Id.* at 738.

C. Governor's Item Veto

Although the United States Constitution does not provide the President with an "item veto," virtually all of the state constitutions authorize governors to veto parts or "items" of appropriations bills.[70] Pennsylvania's Constitution is no exception.[71] Important questions, concerning the relationship between executive and legislative branches, refereed by the judiciary, have arisen in many states concerning two key questions under their item veto provisions: (1) What is an appropriation bill? and (2) What is an item?[72] In *Jubelirer v. Rendell*,[73] Chief Justice Castille confronted the second question: "[W]hether [a]rticle IV, [s]ection 16 of the Pennsylvania Constitution . . . permits the Governor, when presented with an appropriation bill, to delete portions of the language defining a specific appropriation without disapproving the funds with which the language is associated."[74]

It is very common for legislators to insert substantive language into appropriation bills. This technique, though common, is problematic for several reasons. First, such budget legislation goes through different committees from those that have jurisdiction over the substantive area affected by the language in the appropriation bill. This bypasses the expertise developed by the members of those committees. Second, major appropriations legislation must be enacted to fund the ongoing activities of state government. Therefore, insertion of substantive language in such legislation is oftentimes more likely to pass than if it were contained in an ordinary bill, that was referred to the committee with jurisdiction over the subject matter. Finally, insertion of such language in appropriation bills challenges the governor's use of the item veto, thus raising thorny questions of constitutional interpretation in clashes between the legislature and the executive.

Jubelirer was such a case. Notably, the legislative challengers to the governor's use of the item veto briefed the matter in accordance with the *Edmunds* criteria. Chief Justice Castille, writing for a unanimous court, responded:

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70. *See* Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171 (1993).
71. PA. CONST. art. IV, § 16.
72. Briffault, *supra* note 70, at 1174–75.
73. 953 A.2d 514, 517 (Pa. 2008).
74. *Id.* at 517. "Given the parties' agreement that the 2005 GAA is an appropriation bill—which it obviously is—their dispute boils down to the meaning of 'item' for purposes of Section 16—*i.e,* that of which the Governor may disapprove." *Id.* at 529.

> The question presented in *Edmunds* involved the possible tension between federal and Pennsylvania constitutional law.
>
> * * *
>
> In contrast, this Court is sometimes presented with cases requiring us to interpret a provision of the Pennsylvania Constitution that lacks a counterpart in the U.S. Constitution. In such cases, because there is no federal constitutional text or federal caselaw to consider, we have not engaged in the four-factor analysis set forth in *Edmunds*.
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> * * *
>
> Because there is no counterpart to [s]ection 16 in the U.S. Constitution –and thus there is no comparative constitutional argument forwarded—the instant case falls into that category of constitutional cases that does not lend itself well to the traditional *Edmunds* analysis.[75]

Moving to the substance of the controversy, Chief Justice Castille, as with most of his opinions, carefully reviewed the arguments of the parties noting the governor's argument that "if the General Assembly puts in a condition restricting the use of a specific appropriation, that condition qualifies as an 'item' within the meaning of [s]ection 16 . . . ."[76] He then provided some basic or general approaches to state constitutional interpretation,[77] followed by a careful textual analysis:

> Construing "item" for purposes of [a]rticle IV, [s]ection 16 of our Constitution as any part of an appropriation bill would deprive the [s]ection 16 phrase "item[s] of appropriation" of any effect and therefore must be disfavored. Moreover, it seems evident that, in initially using in [s]ection 16 the phrase "item[s] of any bill making appropriations of money," the focus was not on providing a precise definition of "item" but on dis-

75. 953 A.2d at 523–25. Chief Justice Castille pointed out that "this author has suggested that state constitutional holdings, in the comparative area, that are unsupported by an *Edmunds* analysis have less secure constitutional footing." *Id.* at 523 n.10. He also noted that even though the *Edmunds* factors were not required in cases that did not seek an interpretation of the Pennsylvania Constitution beyond an identical or similar provision of the Federal Constitution, arguments presented according to at least some of the *Edmunds* criteria could prove useful. *Id.* at 525 n.12.

76. *Id.* at 526.

77. *Id.* at 528; *see generally* WILLIAMS, *supra* note 7, at 314.

> tinguishing the type of bill to which the Constitution was referring (*i.e.*, an appropriation bill) from that to which it had been referring in [a]rticle IV, [s]ection 15 (*i.e.*, general legislation). Thus, the context of [s]ection 16 indicates that a provision of an appropriation bill is an item if it directs that a specific sum of money be spent for a particular purpose.[78]

He then reviewed, and distinguished, decisions from a number of sister states dealing with their item veto provisions.[79] He then concluded that: "Article IV, [s]ection 16 of the Pennsylvania Constitution prohibits the Governor from effectively vetoing portions of the language defining an appropriation without disapproving the funds with which the language is associated."[80]

D. Judicial Authority over Sentencing

In *Commonwealth v. Mockaitis*,[81] Justice Castille dealt with a statute that required sentencing courts to order installation of approved ignition interlock systems for serial DUI defendants.[82] After resolving jurisdictional issues, he concluded that legislation requiring the judiciary to perform ministerial "executive" functions – including ensuring the systems have been installed and reporting to the Department of Transportation – were unconstitutional intrusions into judicial authority.[83] In other words, the legislature encroached on the Pennsylvania Supreme Court's supervisory authority by assigning executive functions ("deputize") to employees of the courts.[84] Justice Castille stated:

> This scheme essentially forces court employees to serve the function of the Department of Transportation in discharging its executive responsibility of regulating whether and when repeat DUI offenders are entitled to conditional restoration of their operating privileges.[85]

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78. *Id.* at 531–32.
79. *Id.* at 534–35. This kind of reference to the constitutional decisions of other states is, of course, unavailable in federal constitutional interpretation.
80. *Id.* at 537.
81. 834 A.2d 488, 490 (Pa. 2003).
82. 42 PA. CONS. STAT. §§ 7001–03. This law was passed to respond to the "coercive effect" of a condition of receiving federal highway funds. *Mockaitis*, 834 A.2d at 491.
83. *Mockaitis*, 834 A.2d at 499.
84. *Id.* (citing PA. CONST. art. V, § 10).
85. *Id.* at 500.

E. Legislative and Judicial Pay Raises and a Coercive Nonseverability Clause

In 2005, the Pennsylvania General Assembly, utilizing an abbreviated process without floor debate at 2:00 a.m., enacted a law providing for pay raises and future linkage to federal pay levels for officials in all three branches of government ("Act 44").[86] The enactment of this law, which included a legislative pay raise, stimulated a firestorm of popular outrage. In response, the General Assembly repealed Act 44 in its entirety.[87] Normally, such a legislative about-face would not have caused any constitutional problems. However, the provision of Act 44 concerning legislators had delayed their actual *salary* increase, but granted an immediate increase in "unvouchered expenses" that was exactly equal to the future pay raise. The Pennsylvania Constitution prohibits the legislature from *increasing* its own pay during the term for which it has been elected.[88] Notably in this context, however, the Pennsylvania Constitution also prohibits judicial salaries from being *reduced*.[89] As a result, the argument could be made that the legislative pay raise in Act 44 ("unvouchered expenses") was unconstitutional, but that the effect of Act 72, the repealing legislation taking away an enacted judicial pay raise, was also unconstitutional.

Litigation was filed concerning this whole situation and finally reached the Pennsylvania Supreme Court in 2006.[90] Justice Castille wrote the opinion for the court, with Chief Justice Ralph Cappy recusing himself, most likely because he had published several editorials endorsing the judicial pay raise.[91] There was a serious state constitutional challenge to the legislative procedure leading to the adoption of Act 44. This was based upon the provisions in the Pennsylvania Constitution providing certain requirements for the enactment of statutory law.[92] These provisions, aimed at transparent governance in a democracy, require bills to contain no more than one subject, which is expressed in its title, not to be altered on their passage through the legislature to change their original purpose, to be referred to committee, and considered on three different days in

86. Act of July 7, 2005, P.L. 201, No. 44. *See* Stilp v. Commonwealth, 905 A.2d 918, 925 (Pa. 2006).

87. Act of November 16, 2005, P.L. 385, No. 72 [hereinafter Act 72].

88. PA. CONST. art. II, § 8.

89. PA. CONST. art. V, § 16(a).

90. *Stilp*, 905 A.2d at 918.

91. *Id.* at 925.

92. PA. CONST. art. III, §§ 1–4. *See generally* Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Problems of Judicial Enforcement and Legislative Compliance*, 48 U. PITT. L. REV. 797 (1987).

each house. It is possible that the more cautious course for Justice Castille and the court would have been simply to declare the entire Act 44 unconstitutional as violative of these legislative procedure provisions. After detailed analysis, however, Justice Castille applied a deferential analysis to uphold the Act's legislative procedure.[93]

In a fairly transparent attempt to deny the court the judicial pay raise if it struck down the legislative "pay raise," the General Assembly included in Act 44 a "nonseverability provision."[94] In other words, if the court were to strike down the legislative provision the legislative intent was to have the judicial pay raise go down with it. Justice Castille provided a deep analysis of the question of the enforcement of nonseverability clauses, in a context where it seems to have been included in an attempt to coerce the court not to strike down the legislative pay raise. Relying on an important scholarly article,[95] he stated:

> Kameny describes the use of a nonseverability provision as "serv[ing] and in terrorem function, as the legislature attempts to guard against judicial review all together by making the price of invalidation too great." *Id.* at 1001. This sort of practice, he continues, is "especially troubling" because it "represent[s] an attempt by the legislature to prevent the judiciary from exercising a power that rightly belongs to it. . . . These clauses, in other words, amount to coercive threats."[96]

Thus, what might have seemed to be an ordinary expression of legislative intent concerning the possibility of partial invalidation of a statute was revealed to be a separation of powers violation in attempting to coerce the Pennsylvania Supreme Court not to perform its constitutional function of judicial review. Justice Castille noted that retribution against the courts by other branches of government was unacceptable. He continued:

> In this case, the potential "retribution" is built into the statute itself in the would-be automatic effect of the nonseverability provision. It is improper, to say the least, for the Legislature to put a coequal branch of government in such a position.

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93. *Stilp*, 905 A.2d at 951–59.

94. *Id.* at 970.

95. Fred Kameny, *Are Inseverability Clauses Constitutional?*, 68 ALB. L. REV. 997, 997–98 (2005); *see generally* Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. LEGIS. 227, 267–68 (2004).

96. *Stilp*, 905 A.2d at 979 (also citing Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 919–20 (1997)).

> Whether this effect is the sole or primary purpose of the non-severability provision, and whether it is entirely deliberate, is of less importance than the fact of its existence in such legislation, and the obvious influence such a provision might be designed to exert over the independent exercise of the judicial function. In a case such as this, we conclude, enforcement of the clause would intrude upon the independence of the Judiciary and impair the judicial function. Accordingly, we will not enforce the clause but instead we will effectuate our independent judgment concerning severability.[97]

Based on this assertion of judicial independence, Justice Castille held that the unvouchered expense provision was unconstitutional, and could be validly severed from the "other-wise-constitutionally valid" portions of Act 44, including the judicial pay increase.[98] In an earlier decision, the Pennsylvania Supreme Court had upheld another legislative increase in "unvouchered expenses."[99] Justice Castille distinguished this earlier decision, concluding that in this instance the increased unvouchered expenses had no reasonable relationship to actual expenses.[100] Next, the portion of Act 72 purporting to repeal the judicial pay raise was deemed unconstitutional as an invalid attempt to reduce judicial salaries.[101]

This decision also drew a firestorm of criticism. Again, possibly the more cautious approach would have been simply to declare Act 44 unconstitutional ab initio, therefore invalidating the pay increases for all three branches. Viewed objectively, however, Justice Castille's analysis seems proper, or at least defensible. Seen in this light, it could be characterized as a courageous decision, in the face of almost certain political criticism as a self-serving act of judicial review.

F. Pennsylvania Constitution's Appropriations Clause Preempted by Federal Statute

Pennsylvania's Constitution, like those in most states, provides that no money may be expended by state government unless appropriated by law.[102] For a number of years prior to 2009, when the

97. *Id.* at 980.
98. *Id.* at 981.
99. Consumer Party of Pa. v. Commonwealth, 507 A.2d 323 (1986).
100. *Stilp*, 905 A.2d at 969–70.
101. *Id.*
102. PA. CONST. art. III, § 24.

governor and legislature could not agree on a budget or appropriations bill by the end of the fiscal year, Governor Edward Rendell took the position that he would have to furlough state employees who he deemed nonessential to the health and safety of the state. My wife, Alaine Williams, representing the American Federation of State, County and Municipal Employees, contended that the Federal Fair Labor Standards Act (FLSA) preempted, under the Federal Supremacy Clause,[103] the state constitution's appropriation provision.[104] The governor had been using his view that he could not pay state employees as grounds to bargain with the legislature for programs he wanted in the budget. The union, by contrast, did not want its members to miss paydays ("payless paydays") as bargaining chips in larger political controversies. The union sought a declaratory judgment that the state constitution's appropriations provision was preempted by the FLSA, therefore depriving the governor of the argument that he had to furlough state employees. The matter made its way to the Pennsylvania Supreme Court, and in an opinion by Chief Justice Castille, the court agreed with the union, and declared that the FLSA did in fact preempt the Pennsylvania Constitution's appropriations clause. Chief Justice Castille stated:

> The Union Parties asserted that Section 6 of FLSA preempts [a]rticle III, [s]ection 24 of the Pennsylvania Constitution. Therefore, according to the Union Parties, the view held by the Governor and others in the Administration that [s]ection 24 bars the Commonwealth from continuing to employ and pay all FLSA-covered employees, if a general appropriations act is not enacted by the start of the Commonwealth's new fiscal year, was erroneous as a matter of law.
>
> * * *
>
> Therefore, we conclude that through conflict preemption, Congress' intent for Section 6 of FLSA to preempt state law provisions such as [s]ection 24 is manifest and clear, and that the presumption against preemption that the Executive Parties rely upon to argue that Section 6 does not displace [s]ection 24 is presently overcome. Furthermore, since [s]ection 24 is

103. "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any Thing in the *Constitution* or laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2 (emphasis added).

104. Council 13 AFSCME *ex rel.* Fillman v. Rendell, 986 A.2d 63 (Pa. 2009).

> preempted, [s]ection 24 is without effect in this instance and thus, ceases to have legal significance. Accordingly, we hold that the Union Parties are entitled to the declaratory judgment they sought: that [s]ection 24 did not prohibit the Commonwealth from continuing to employ and pay all FLSA nonexempt Commonwealth employees in the event that the Pennsylvania General Assembly failed to pass a budget by July 1, 2008.[105]

There have been no payless paydays since.

This holding by Chief Justice Castille illustrates a fundamental characteristic of state constitutions within our federal system: Under the Supremacy Clause, provisions of state constitutions may be preempted or even unconstitutional, as contrary to the United States Constitution or valid federal statutes such as FLSA.[106] Just as in the area of reapportionment, Chief Justice Castille recognized that the Pennsylvania Constitution must coexist, in a subservient position, with the U.S. Constitution and laws.

The state defendants in this litigation argued all along that it was a nonjusticiable "political question."[107] Under this doctrine, state courts should not intrude upon authority assigned to a co-equal branch of government by the Constitution.[108] Just as with the doctrine of mootness, as with many other doctrines, the political question doctrine may be viewed differently by state courts under state constitutions than it is viewed by the United States Supreme Court under the U.S. Constitution.[109] The portion of Chief Justice Castille's opinion concerning the political question doctrine is a landmark in Pennsylvania. His analysis included the following important statement:

> The happenstance that the preemption issue the Union Parties posed to the court arises in political circumstances, when a budget impasse was looming and the Governor was announcing furlough options and decisions, does not change the nature of the jurisprudential issue from one of law that the courts are to decide, to one of executive policy that the courts are not to consider. . . . [T]he political question doctrine is a shield, not a sword. The doctrine exists to protect the Executive branch from intrusion by the courts into areas of political policy and executive prerogative; it does not exist to remove a question of

105. *Id.* at 70, 82.
106. WILLIAMS, *supra* note 7, at 99.
107. *Fillman*, 986 A.2d at 73–74.
108. *Id.* at 74.
109. WILLIAMS, *supra* note 7, at 298–99.

> law from the Judiciary's consideration merely because the Executive branch has forwarded its own opinion of the legal issue in a political context.[110]

Chief Justice Castille's political question analysis caught the attention of a leading state constitutional scholar, writing about the doctrine. Dean Daniel B. Rodriguez of Northwestern University School of Law cited the case and quoted it in support of his thesis that "[s]tate courts have engaged in fairly substantial policy-type interventions" and "self-confidence has been a conspicuous part of the doctrine in the decided cases."[111]

G. Sovereign Immunity and Governmental Torts

In 2014, the Pennsylvania Supreme Court confronted the case of a schoolgirl who was terribly injured by a school bus operated by a school district.[112] She sued the school district and received a multi-million dollar jury verdict, which was then reduced by the trial court to $500,000 pursuant to Pennsylvania's Tort Claims Act.[113] This statutory "damage cap" was enacted by the legislature pursuant to article I, section 11:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.[114]

Statutory caps on damages in civil litigation, against both private and governmental defendants, can be categorized under the broad heading of "Tort Reform."[115] In the absence of any meaningful *federal* constitutional arguments against such damage caps, it is the state constitutions that had been in the forefront of constitutional challenges to them.[116] These cases have relied on a number of state

110. *Fillman*, 986 A.2d at 76.
111. Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law,* 43 RUTGERS L.J. 573, 584 (2013).
112. Zauflik v. Pennsbury Sch. Dist., 104 A.3d 1096 (Pa. 2014).
113. *Id.*; 42 PA. CONS. STAT. §§ 8501–8564.
114. PA. CONST. art. I, § 11.
115. *Thirteenth Annual Issue on State Constitutional Law: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897 (2001).
116. Robert F. Williams, *Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897 (2001).

constitutional provisions such as right to remedy guarantees, right to civil jury trial, separation of powers, as well as others.[117]

In the *Zauflik* litigation, the plaintiff relied on all of these arguments, as well as an equal protection argument.[118] When the case reached the Pennsylvania Supreme Court, Chief Justice Castille, as is his usual approach to state constitutional interpretation, provided an in-depth review of the history of limitation on damages against *governmental* defendants, by contrast to *private* defendants.[119] In this instance, there were earlier cases directly on point upholding such damage caps against governmental defendants.[120]

Ultimately, relying substantially on prior precedent, but also on the distinction between governmental and private defendants, Chief Justice Castille upheld the damage cap. He stated:

> Pennsylvania courts have struggled with the difficult questions raised in this appeal—and the attendant policy implications—since the very beginnings of our common law system. The facts here are tragic, involving a school student who suffered grievous injuries caused by the uncontested negligence of the school district's employee. But, the circumstances are not unprecedented, and the lower courts did not err in relying on our prior cases to uphold the legislation at issue, as against the present constitutional challenges. Moreover, the conclusion that the General Assembly is in the better position than this Court to address the complicated public policy questions raised by the larger controversy has substantial force. Accordingly, we uphold the limitation on damages recoverable under Section 8553(b) of the Act, and therefore affirm the order of the Commonwealth Court.[121]

In the portion of his opinion concerning the equal protection claim, Chief Justice Castille relied, rather uncritically, on prior Pennsylvania Supreme Court decisions interpreting the equality provisions of the Pennsylvania Constitution to be "coextensive" with the Equal Protection Clause of The Fourteenth Amendment.[122] I have been quite critical of these earlier decisions interpreting the

117. *Id.* at 897–88.
118. *See Zauflik*, 104 A.3d 1096.
119. *Id.* at 1124.
120. *Id.* at 1125–26.
121. *Id.* at 1133.
122. *Id.* at 1117; *see also* Kramer v. W.C.A.B. (*Rite Aid Corp.*), 883 A.2d 518, 532 (Pa. 2005) (explaining "same standards" and "coterminous").

Pennsylvania constitutional equality provisions "in lockstep" with Federal Equal Protection doctrine.[123]

H. State Constitutional Environmental Protection

State constitutions contain a number of *positive* rights guarantees, by contrast to the U.S. Constitution's more familiar *negative* rights.[124] A number of state constitutions now contain environmental rights provisions. Pennsylvania's provision, dating from 1971, provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[125]

In 2013, after remaining relatively dormant since 1971, the Pennsylvania Supreme Court breathed life into the clause in an opinion by Chief Justice Castille.[126] The leading authority on this provision, John Dernbach,[127] analyzes this landmark decision in this issue of the *Duquesne Law Review*.[128]

IV. CONCLUSION

It is clear from this selection of opinions by Chief Justice Castille, including those before he became Chief Justice, that he has delved quite deeply into the Pennsylvania Constitution, confronting a wide variety of circumstances where the state constitution must interact with the U.S. Constitution. In virtually all of these opinions he has

123. Robert F. Williams, *Pennsylvania's Equality Provisions*, *in* GORMLEY, ET AL., *supra* note 13, at 731; *State Constitutional Equality Doctrine*, *supra* note 4; WILLIAMS, *supra* note 7, at 211–29.

124. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

125. PA. CONST. art. I, § 27.

126. Robinson Twp., Washington Cnty. v. Commonwealth, 83 A.3d 901 (Pa. 2013) (citing Professor Dernbach prominently).

127. *See* John C. Dernbach, *Natural Resources and the Public Estate*, *in* GORMLEY ET AL., *supra* note 13, at 683.

128. John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335 (2013).

explored the history of the relevant state constitutional clause (including its interaction with the U.S. Constitution) often going all the way back to 1776. Further, his opinions are useful in that they thoroughly review the arguments of the parties, prior to his reaching a holding. His opinions also provide a thorough history of the prior litigation under the particular state constitutional provision being reviewed. Also, he is attentive to the decisions of other states under their constitutions that are identical or similar to the Pennsylvania constitutional provision under review.

If one were to read Chief Justice Castille's state constitutional law opinions, all of the basics of this field would become apparent. These opinions will shape Pennsylvania's constitutional interpretation for years to come. In sum, I agree with Professor Bruce Ledewitz' prediction: "He will go down in history as perhaps the justice who has had more influence on the interpretation of the Pennsylvania Constitution than any other judge."[129]

129. Chris Mondics, *Ron Castille: From Vietnam valor and injury to historic tenure as Pa. Chief Justice*, PHILADELPHIA INQUIRER, Jan. 12, 2015, at A1.