

STILL LIVING AFTER FIFTY YEARS: A CENSUS OF JUDICIAL REVIEW UNDER THE PENNSYLVANIA CONSTITUTION OF 1968

*Seth F. Kreimer**

TABLE OF CONTENTS

INTRODUCTION.....	289
I. THE EVOLUTION OF THE PENNSYLVANIA CONSTITUTION AND OF PENNSYLVANIA JUDICIAL REVIEW	293
II. FIFTY YEARS OF INDEPENDENT JUDICIAL REVIEW UNDER THE CONSTITUTION OF 1968	305
A. <i>The Frequency of Independent Constitutional Review: The Size of the Dragon</i>	306
B. <i>Teeth and Claws: The Constitutional Claims</i>	312
III. PARALLEL, CONGRUENT, AND SKEW PROVISIONS IN PENNSYLVANIA CONSTITUTIONAL LAW	316
A. <i>Parallel Provisions</i>	319
B. <i>Congruent Provisions</i>	322
1. Article I, Section 1: Liberty, Property, Reputation, and “Due Process” Without Benefit of Text.....	325
a. <i>Procedure Without Due Process</i>	325
b. <i>“Inherent and Indefeasible Rights”: “Acquiring, Possessing and Protecting Property”</i>	326
c. <i>“Defending . . . liberty . . . protecting . . . reputation, and of pursuing their own happiness”</i>	331
2. Protecting Equality Without Equal Protection.....	335
a. <i>Tax Uniformity</i>	337
b. <i>Equal Rights Amendment</i>	339
c. <i>Generic Constitutional Equality Analysis</i>	340

* Kenneth W. Gemmill Professor of Law, University of Pennsylvania Law School. This Article has benefited from the striking insight, precision, and initiative of my research assistant Maura Douglas, J.D., 2018. She deserves credit as co-author of Appendix C, and my profound gratitude for her invaluable work on the Article’s text. The Article benefited as well from the comments of Mitch Berman, Michael Churchill, Ben Geffen, Dan Urevick-Ackelsberg and Bob Williams, and the unflagging research support of Mariah Ford. Each is entitled to my deep thanks. None of these benefactors bears responsibility for remaining errors or misunderstandings, which remains my own.

C. <i>Disanalogous/Skew Provisions</i>	344
1. Judicial Autonomy	348
2. Due Process of Lawmaking	349
3. Skew Provisions and Public Impact	351
IV. STILL LIVING AFTER FIFTY YEARS	353
V. CONCLUSION	359
APPENDIX A: METHODOLOGY: FIFTY YEARS OF PENNSYLVANIA SUPREME COURT JUDICIAL REVIEW UNDER THE CONSTITUTION OF 1968 ...	360
APPENDIX B: CHARTS	362
APPENDIX C: PENNSYLVANIA SUPREME COURT EXERCISE OF INDEPENDENT JUDICIAL REVIEW UNDER THE PENNSYLVANIA CONSTITUTION 1968–2018	366
I. GOVERNMENT STRUCTURE AND PROCESS OF LAW MAKING	367
A. <i>Art. II, § 1 [Non-Delegation Doctrine]</i>	367
B. <i>Art. III, § 3 [Single Subject Rule]</i>	369
C. <i>Judicial Autonomy and Administration</i>	370
D. <i>Limits on Legislative Process</i>	380
E. <i>Limits on Executive Action</i>	382
F. <i>Limits on Municipal Action</i>	383
II. DECLARATION OF RIGHTS AND SUBSTANTIVE LIMITS	386
A. <i>Art. I, § 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”]</i>	386
1. Substantive Limits on Undue Oppression	386
2. Procedural Limits	392
3. Reputation and Privacy	394
B. <i>Art. I, § 3 [Religious Freedom]</i>	397
C. <i>Art. I, § 5 [Elections]</i>	397
D. <i>Art. I, § 6 [Jury Trial]</i>	398
E. <i>Art. I, § 7 [Free Expression]</i>	399
F. <i>Art. I, § 10 [Taking]</i>	401
G. <i>Art. I, § 11 [Remedies]</i>	403
H. <i>Art. I, § 13 [Cruel Punishment]</i>	406
I. <i>Art. I, § 17 [Ex Post Facto]</i>	408
J. <i>Art. I, § 17 [Impairment of Contracts]</i>	409
K. <i>Art. I, § 27 [Environmental]</i>	411
L. <i>Art. I, § 28 [Equal Rights Amendment]</i>	412
M. <i>Art. III, § 14 [Education]</i>	416
N. <i>Art. III, § 32 [Equal Treatment]</i>	416
O. <i>Art. VIII, § 1 [Tax Uniformity]</i>	420
III. CRIMINAL PROCESS	424

A. <i>Art. I, § 8 [Search and Seizure]</i>	424
B. <i>PA. Const. Art. I, § 9</i>	438
1. Assistance of Counsel	438
2. Law of the Land.....	443
3. Additional Rights of the Accused.....	445
C. <i>PA. Const. Art. I, § 10 [Double Jeopardy]</i>	453

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 Scoloro, *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 Rights*, 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.

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 Gibson³¹ 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 defeasible 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 Comm’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

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 inalienable 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

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).

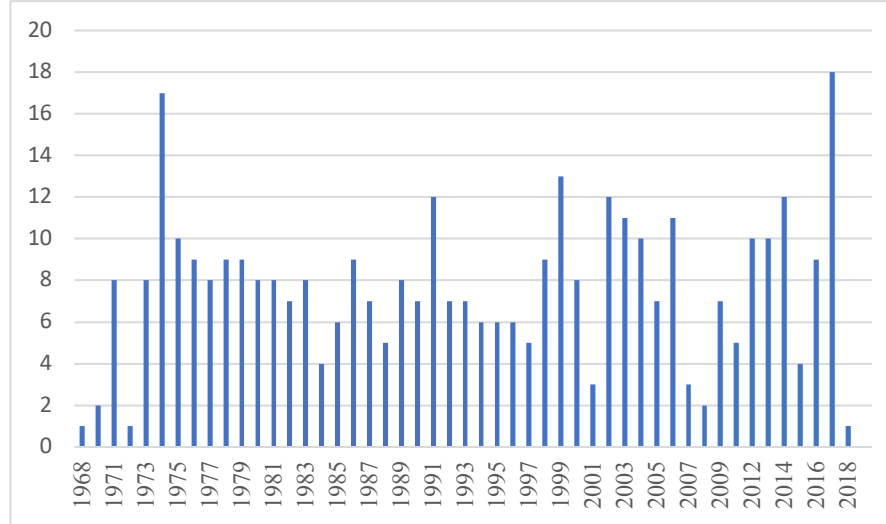
78. Compare Saylor, *supra* note 4, at 309–12 (“[C]ourts should at the outset identify the constitutional value or norm at issue . . . [and determine] whether the salient, constitutional value is, in some way, under-protected by the application of the prevailing rule or standard,” and follow an “exercise [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.*

2018]

STILL LIVING

307

Chart 1: Independent Judicial Review by Year, 1968–2018⁸⁰

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

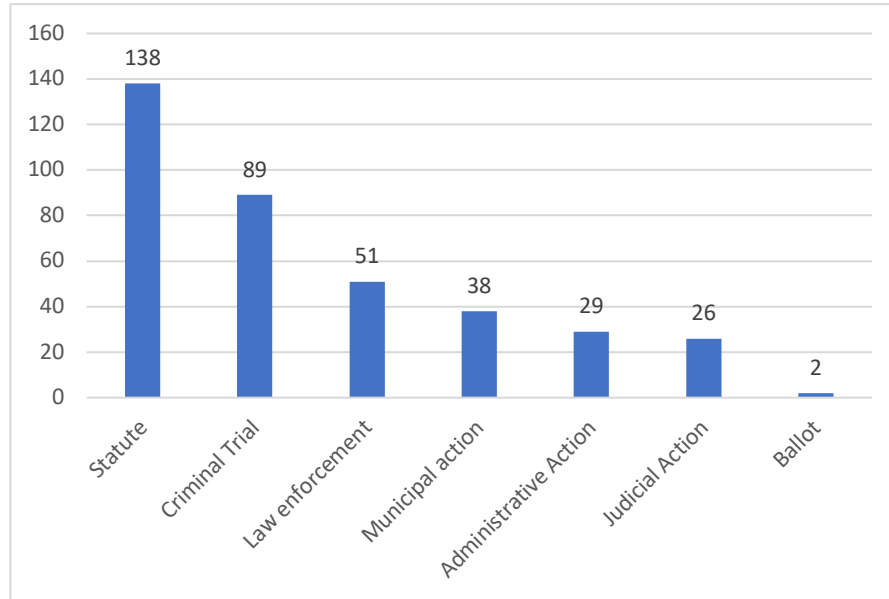
1968	1	1994	6
1970	2	1995	6
1971	8	1996	6
1972	1	1997	5
1973	8	1998	9
1974	17	1999	13
1975	10	2000	8
1976	9	2001	3
1977	8	2002	12
1978	9	2003	11
1979	9	2004	10
1980	8	2005	7
1981	8	2006	11
1982	7	2007	3
1983	8	2008	2
1984	4	2009	7
1985	6	2010	5
1986	9	2012	10
1987	7	2013	10
1988	5	2014	12
1989	8	2015	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.

2018]

STILL LIVING

309

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

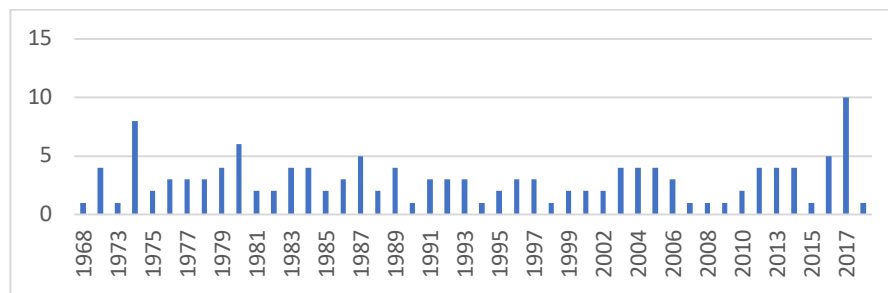
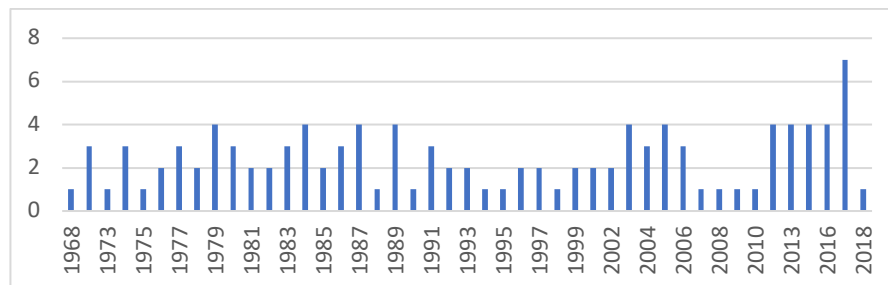


Chart 4: Statutory Review by Year Without a Federal Violation



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 . . .").

2018]

STILL LIVING

313

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

2018]

STILL LIVING

315

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 jurists 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 track⁸⁶—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.

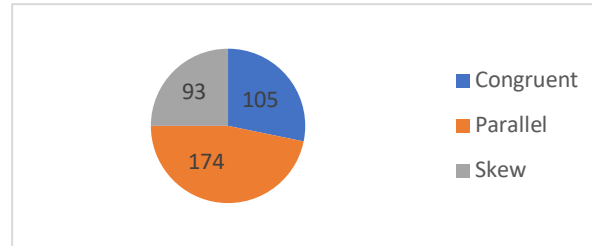
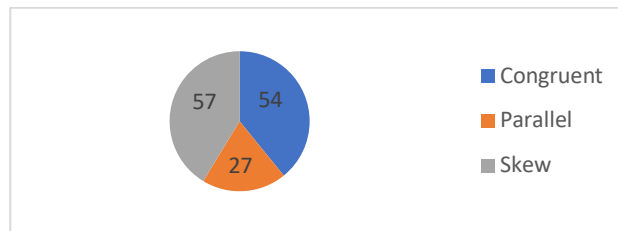
92. PA. CONST. art. V, § 10.

93. PA. CONST. of 1968, art. I, § 27 (1971).

2018]

STILL LIVING

319

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 inalienable 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.*

2018]

STILL LIVING

323

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 inalienable 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., *Palaret’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 infeasible 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 infeasible 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

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 exclusionary¹¹⁰ 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 stigma¹¹⁸ 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 actions¹²² 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 infeasible 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 analysis¹⁴⁵ 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.

2018]

STILL LIVING

345

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
<i>[leg. limits + single-subject]</i>	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

2018]

STILL LIVING

347

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 Convention¹⁶⁴—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. Env’tl. 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, section 3); *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 provisions¹⁷⁹ 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).

APPENDIX A: METHODOLOGY: FIFTY YEARS OF PENNSYLVANIA SUPREME COURT JUDICIAL REVIEW UNDER THE CONSTITUTION OF 1968

Selection of cases for this census began with the cases identified in the Lexis Pennsylvania Supreme Court file using the following search: (“pennsylvania constitution” or “constitution of pennsylvania” or “state constitution”) and (“unconstitutional” or violat!), undertaken between January 2018 and July 2018. The search generated a total of 1,586 entries over the fifty-year period following ratification of the 1968 Amendments on April 23, 1968. This constituted roughly 16% of the cases reported during this period. [A search for “held” during the fifty-year period in the Pennsylvania Supreme Court file generated 9242 cases].

Within this sample, we then identified the opinions in which the Pennsylvania Supreme Court invoked the Pennsylvania Constitution as part of the rationale for a decision exercising judicial review. This search was supplemented by Shepardizing the identified cases to find additional relevant cases within the period, and also searching for references in cases to constitutional provisions invoked as authoritative in identified cases.

This process generated a total of 373 cases in which the Pennsylvania Supreme Court exercised its authority of judicial review under the Pennsylvania Constitution during the fifty-year period April 23, 1968–April 23, 2018. The fifty-year period provides a convenient closing date for the sample.

The cases selected included:

- Cases in which official actions were declared unconstitutional as violating the Pennsylvania Constitution (coded as “yes,” 293 cases)
- Cases in which legal rules were interpreted in light of the mandates of the Pennsylvania Constitution (coded as “statutory construction”—although in 19 of the 51 cases, actions were undertaken by entities other than the state legislature)
- Cases in which the Pennsylvania Supreme Court sustained the viability of a state constitutional challenge but remanded the case for resolution in light of that ruling (coded as “remand,” 29 cases)
- Cases that did not rely on the Pennsylvania Constitution for a rule of decision were excluded from the sample, as were cases in which challenged official actions were held to be wholly consistent with Pennsylvania constitutional norms.

2018]

STILL LIVING

361

The identified sample of constitutional review cases was coded to identify:

- The state constitutional provision on which the case turned
 - Because of limitations of the data analysis program, cases could only be coded in one category. Where two or more categories potentially applied (as where more than one constitutional provision was the basis for determination) the cases were coded on the basis of which mode of analysis predominated. Appendix C contains multiple entries for cases which invoked multiple provisions.
- Whether the Pennsylvania Supreme Court also found a federal constitutional violation (117 cases in the sample), and whether the interpretation of the state constitution followed federal rules (130 cases in the sample)
- The relation between the wording of the state constitutional provision invoked and federal constitutional provisions:
 - “Parallel” provisions (174 cases), using the same wording
 - “Congruent” provisions (106 cases), analogous subjects but using different wording
 - “Skew” provisions (93 cases), disanalogous subject and wording
- The source of the official action reviewed:
 - Administrative action by state executive officials or agencies (29 cases)
 - Ballot measure (2 cases)
 - Criminal trial, including judicial rulings and prosecutorial actions (89 cases)
 - Judicial action in a non-criminal context (26 cases)
 - Law enforcement action by state or local officers (51 cases)
 - Municipal action (38 cases)
 - Statute (138 cases)
- An excel spreadsheet incorporating this coding was provided to the *Rutgers University Law Review*, and is available for review on request.

APPENDIX B: CHARTS

**Independent Constitutional Review by Justice
1968–2018 (32 Justices)**

Zappala	41
Flaherty	36
Roberts	33
Nix	28
Castille	24
Saylor	19
Cappy	19
Nigro	15
Todd	14
O'Brien	13
Manderino	13
Per curiam	12
Baer	12
Newman	11
Larsen	11
Eakin	10
Jones	7
Papadacos	7
Wecht	7
Eagen	6
Hutchinson	6
Donohue	6
Lamb	3
McDermott	3
Stout	2
Fitzgerald	2
Orie Melvin	2
Pomeroy	2
Stevens	2
Unanimous	1
Bell	1
Dougherty	1

2018]

STILL LIVING

363

Kauffman	1
Jones, O'Brien, Nix	1
Montemuro	1
Baer, Todd	1
Total	373

**Independent Constitutional Review of Statutes by Justice
1968–2018 (25 Justices)**

Zappala	18
Statutory construction	5
Yes	13
Roberts	14
Statutory construction	1
Yes	13
Flaherty	14
Statutory construction	4
Yes	10
Nix	13
Statutory construction	6
Yes	7
Castille	9
Remand	1
Statutory construction	1
Yes	7
Per curiam	9
Remand	1
Statutory construction	1
Yes	7
Saylor	9
Remand	1
Statutory construction	1
Yes	7
Todd	6
Remand	1

Yes	5
Cappy	5
Yes	5
Larsen	5
Statutory construction	3
Yes	2
Eagen	4
Statutory construction	2
Yes	2
Manderino	4
Remand	1
Yes	3
Baer	4
Yes	4
Wecht	4
Remand	1
Yes	2
Statutory construction	1
O'Brien	3
Statutory construction	1
Yes	2
Nigro	3
Yes	3
Jones	2
Statutory construction	1
Yes	1
Hutchinson	2
Statutory construction	1
Yes	1
Newman	1
Yes	1
Eakin	1
Yes	1
Papadakos	1
Yes	1

2018]

STILL LIVING

365

Fitzgerald	1
Statutory construction	1
Unanimous	1
Yes	1
Pomeroy	1
Yes	1
Dougherty	1
Yes	1
Donohue	1
Statutory construction	1
Montemuro	1
Statutory construction	1
Total	138

APPENDIX C: PENNSYLVANIA SUPREME COURT EXERCISE OF INDEPENDENT
JUDICIAL REVIEW UNDER THE PENNSYLVANIA CONSTITUTION 1968–2018**PENNSYLVANIA SUPREME COURT EXERCISE OF
JUDICIAL REVIEW UNDER THE PENNSYLVANIA
CONSTITUTION 1968–2018**

*Seth F. Kreimer, Kenneth W. Gemmill Professor of Law,
University of Pennsylvania, and Maura Douglas, J.D. 2018
University of Pennsylvania Law School*

I. GOVERNMENT STRUCTURE AND PROCESS OF LAW MAKING	181
A. <i>Art. II, § 1 [Non-Delegation Doctrine]</i>	181
B. <i>Art. III, § 3 [Single Subject Rule]</i>	183
C. <i>Judicial Autonomy and Administration</i>	184
D. <i>Limits on Legislative Process</i>	194
E. <i>Limits on Executive Action</i>	196
F. <i>Limits on Municipal Action</i>	197
II. DECLARATION OF RIGHTS AND SUBSTANTIVE LIMITS	200
A. <i>Art. I, § 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”]</i>	200
1. Substantive Limits on Undue Oppression.....	200
2. Procedural Limits	206
3. Reputation and Privacy	208
B. <i>Art. I, § 3 [Religious Freedom]</i>	211
C. <i>Art. I, § 5 [Elections]</i>	211
D. <i>Art. I, § 6 [Jury Trial]</i>	212
E. <i>Art. I, § 7 [Free Expression]</i>	213
F. <i>Art. I, § 10 [Taking]</i>	215
G. <i>Art. I, § 11 [Remedies]</i>	217
H. <i>Art. I, § 13 [Cruel Punishment]</i>	220
I. <i>Art. I, § 17 [Ex Post Facto]</i>	222
J. <i>Art. I, § 17 [Impairment of Contracts]</i>	223
K. <i>Art. I, § 27 [Environmental]</i>	225
L. <i>Art. I, § 28 [Equal Rights Amendment]</i>	226
M. <i>Art. III, § 14 [Education]</i>	230
N. <i>Art. III, § 32 [Equal Treatment]</i>	230
O. <i>Art. VIII, § 1 [Tax Uniformity]</i>	234

2018]

STILL LIVING

367

III. CRIMINAL PROCESS	238
A. <i>Art. I, § 8 [Search and Seizure]</i>	238
B. <i>Pa. Const. Art. I, § 9</i>	252
1. Assistance of Counsel	252
2. Law of the Land	257
3. Additional Rights of the Accused	259
C. <i>Pa. Const. Art. I, § 10 [Double Jeopardy]</i>	267

I. GOVERNMENT STRUCTURE AND PROCESS OF LAW MAKING

A. *Art. II, § 1 [Non-Delegation Doctrine]*

- *Protz v. Workers' Comp. Appeal Bd.*, 161 A.3d 827, 830 (Pa. 2017) (holding provision of Workers' Compensation Act requiring physician to determine a claimant's degree of impairment by applying methodology set forth in the most recent version of guide issued by the American Medical Association was an unconstitutional delegation of legislative authority).
 - Majority: Justice Wecht, joined by Justice Todd, Justice Donohue, Justice Dougherty & Justice Mundy
 - Concurrence: Chief Justice Saylor
 - Dissent: Justice Baer
- *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist.*, 132 A.3d 957, 959, 968 (Pa. 2016) (holding that Distress Law Section 6-696(i)(3) of the School Code, which gave a governor-appointed school reform commission broad power over public education and charter schools in Philadelphia, violated the non-delegation rule in article II, section 1).
 - Majority: Chief Justice Saylor, joined by Justice Todd, Justice Dougherty & Justice Wecht
 - Dissent: Justice Baer, joined by Justice Donohue
 - Justice Eakin did not participate in the consideration or decision of this case.
- *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 415, 419 (Pa. 2005) (finding the provision of Race Horse Development and Gaming Act that barred local subdivisions from prohibiting or regulating licensed gaming facility was unconstitutional delegation of legislative power to the Board).
 - Majority: Chief Justice Cappy, joined by Justice Castille, Justice Nigro, Justice Saylor, Justice Eakin & Justice Baer

- Justice Newman did not participate in the consideration or decision of this matter.
- *Probst v. Commonwealth*, 849 A.2d 1135, 1138, 1142 (Pa. 2004) (holding statute requiring serial DUI offenders to install an ignition interlock before license suspension was lifted violated separation of powers and was an unconstitutional delegation of power of certain responsibilities to the courts).
 - Majority: Chief Justice Cappy, joined by Justice Castille, Justice Nigro, Justice Newman, Justice Saylor & Justice Eakin
 - Former Chief Justice Zappala did not participate in the decision of this case.
- *Commonwealth v. Mockaitis*, 834 A.2d 488, 491, 501 (Pa. 2003) (Act 63, which delegated sentencing courts' responsibilities over installation of ignition interlock devices, violated separation of powers doctrine).
 - Majority: Justice Castille, joined by Justice Cappy, Justice Nigro, Justice Newman & Justice Saylor
 - Former Chief Justices Flaherty and Zappala did not participate in the decision of this case.
- *Blackwell v. Commonwealth*, 567 A.2d 630, 634–35 (Pa. 1989) (holding that the purported one-year extension of the life of the Commission by Leadership Committee pursuant to provision of the Sunset Act was an unconstitutional delegation of legislative power to a subcommittee of the General Assembly).
 - Majority: Justice Larsen, joined by Chief Justice Nix, Justice Flaherty, Justice McDermott & Justice Zappala
 - Justice Papadakos did not participate in the consideration or decision.
- *Commonwealth ex rel. Kane v. McKechnie*, 358 A.2d 419, 420–21 (Pa. 1976) (holding that provision of the Administrative Code delegating appointment of person elected by the State Dental Society as its president to the State Dental Council and Examining Board violated the non-delegation doctrine of article II, section 1).
 - Majority: Justice Manderino, joined by Justice Eagen, Justice Roberts & Justice Nix
 - Dissent: Justice Pomeroy, joined by Chief Justice Jones & Justice O'Brien
- *Hetherington v. McHale*, 329 A.2d 250, 253 (Pa. 1974) (“Section 16(e) violates this principle [of only being governed by elected representatives in a democratic form of government] by

2018]

STILL LIVING

369

surrendering to private organizations the power to select eight of seventeen members of a committee responsible for the disbursement of public funds.”).

- Majority: Justice Roberts, joined by Justice Manderino
- Concurrence: Justice Manderino
- Concurring in the result: Justice Eagen
- Dissent: Chief Justice Jones, joined by Justice O’Brien & Justice Pomeroy

B. Art. III, § 3 [Single Subject Rule]

- Commonwealth v. Derhammer, 173 A.3d 723, 724–25, 731 (Pa. 2017) (finding the State lacked authority to prosecute defendant for failing to comply with sex offender registration and waiting five days to report his address change under Megan’s Law, which had already been ruled unconstitutional in *Neiman* under article III, section 3).
 - Majority: Chief Justice Saylor, joined by Justice Baer, Justice Todd, Justice Donohue, Justice Dougherty, Justice Wecht & Justice Mundy
 - Concurrence: Justice Wecht
 - Concurrence: Justice Mundy
- Leach v. Commonwealth, 141 A.3d 426, 427–28, 430, 435 (Pa. 2016) (holding municipal firearm legislation, Act 192, which added a newly-defined offense of theft of secondary metal while also giving persons adversely affected by local gun-control laws standing to bring an action against the municipality, violated the single subject requirement of article III, section 3).
 - Majority: Chief Justice Saylor, joined by Justice Baer, Justice Todd, Justice Donohue, Justice Dougherty & Justice Wecht
 - Former Justice Eakin did not participate in the consideration or decision of this case.
- Commonwealth v. Neiman, 84 A.3d 603, 605, 613 (Pa. 2013) (determining that Act 152 of 2004 amending Megan’s Law “clearly, palpably, and plainly” violates the single subject rule of the state constitution).
 - Majority: Justice Todd, joined by Justice Saylor, Justice Eakin, Justice Baer & Justice McCaffery
 - Dissent: Chief Justice Castille
 - Former Justice Melvin did not participate in the consideration or decision of this case.
- Pa. State Ass’n of Jury Comm’rs v. Commonwealth, 64 A.3d 611, 613–14 (Pa. 2013) (finding that Act 108 of 2011, which allowed

- counties to abolish office of jury commissioner, violated the single subject rule of the state constitution).
- Majority: Justice Baer, joined by Chief Justice Castille, Justice Saylor, Justice Eakin, Justice Todd & Justice McCaffery
 - Justice Melvin did not participate in the consideration or decision of this case.
 - *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 402–03 (Pa. 2005) (holding that “certain of the appropriations of revenues collected pursuant to the Gaming Act” violated the single subject rule of the state constitution but that these portions were severable from the rest of the Act).
 - Majority: Chief Justice Cappy, joined by Justice Castille, Justice Nigro, Justice Saylor, Justice Eakin & Justice Baer
 - Justice Newman did not participate in the consideration or decision of this matter.
 - *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 571, 593 (Pa. 2003) (holding Act which reorganized the governance of the Pennsylvania Convention Center violated the article III, section 3 prohibition against multi-subject legislation).
 - Majority: Justice Saylor, joined by Chief Justice Cappy, Justice Castille, Justice Nigro, Justice Newman, Justice Eakin & Justice Lamb
 - *Bergdoll v. Kane*, 731 A.2d 1261, 1263, 1266, 1270 (Pa. 1999) (holding ballot question posing amendments to both article I, section 9 and article V, section 10(c) violated the single subject rule—article XI, section 1).
 - Majority: Justice Zappala, joined by Chief Justice Flaherty, Justice Cappy, Justice Castille, Justice Nigro, Justice Newman & Justice Saylor
 - Concurrence: Justice Saylor
 - *Note*: this case refers to the single subject rule with respect to constitutional amendments, article XI, section 1.

C. Judicial Autonomy and Administration

- *Friends of Pa. Leadership Charter Sch. v. Chester City Bd. of Assessment Appeals*, 101 A.3d 66, 67–68, 73, 76, 78 (Pa. 2014) (holding that retroactive application of a real estate tax exemption for nonprofit entities associated with charter schools violated separation of powers because it operated as “a legislative command to open a final judgment and to have the rights and

2018]

STILL LIVING

371

- obligations resolved in that final judgment reassessed in accord with the subsequently expressed legislative will”).
- Majority: Justice Baer, joined by Chief Justice Castille, Justice McCaffery & Justice Stevens
 - Concurrence: Justice Saylor, joined by Justice Todd (finding the exemption violates the Uniformity Clause, not separation of powers)
 - Concurrence: Justice Eakin, joined by Chief Justice Castille (finding the exemption violates both the Uniformity Clause and separation of powers)
- *In re Bruno*, 101 A.3d 635, 641, 661, 682 (Pa. 2014) (holding that article V, section 18 creating the Judicial Conduct Board did not divest the Supreme Court of jurisdiction over juridical discipline matters, and that the Court had supervisory power to order the interim suspension of a sitting judge without pay).
 - Majority: Chief Justice Castille, joined by Justice Eakin, Justice Baer & Justice Stevens
 - Special Concurrence: Chief Justice Castille
 - Concurrence: Justice Saylor, joined by Justice Todd
 - Concurrence: Justice Baer
 - Concurrence: Justice Todd
 - Concurrence: Justice McCaffery
 - *In re Merlo*, 58 A.3d 1, 2, 15, 17 (Pa. 2012) (affirming decision that magisterial district judge “violated article V, section 18(d)(1) . . . by neglecting or failing to perform the duties of her office and by engaging in conduct which brings the judicial office into disrepute[.]” such as her repeated failure to appear, and lateness in appearing, for court hearings, warranting her removal from office).
 - Majority: Justice Todd, joined by Chief Justice Castille, Justice Saylor, Justice Eakin, Justice Baer & Justice McCaffery
 - Justice Melvin did not participate in the consideration or decision of this case.
 - *Jefferson Cty. Court Appointed Emps. Ass’n v. Pa. Labor Relations Bd.*, 985 A.2d 697, 699, 708 (Pa. 2009) (“[E]xamin[ing], in the context of a labor dispute, the inherent conflict between a board of county commissioners’ constitutional right, in its legislative capacity, to implement a budget and the judiciary’s constitutional right to administer justice by hiring, firing, and supervising its employees, within that budget.” Ultimately holding that the county violated the judiciary’s constitutional rights, and that

- “separation of powers doctrine mandate[d] that the County present the Judiciary with the reduced budget and allow the Judiciary to determine how to operate within it.”).
- Majority: Justice Baer, joined by Chief Justice Castille, Justice Todd & Justice McCaffery
 - Concurrence: Justice Greenspan
 - Dissent: Justice Eakin
 - Justice Saylor did not participate in the consideration or decision of this case.
- *Commonwealth v. McMullen*, 961 A.2d 842, 848–50 (Pa. 2008) (finding that the statute (§ 4136) that granted the right to jury trial in all indirect criminal contempt cases involving a violation of a restraining order or injunction violated the Court’s exclusive constitutional authority to establish rules of procedure under article V, section 10(c)).
 - Majority: Eakin, joined by Chief Justice Castille, Justice Baer, Justice McCaffery & Justice Greenspan
 - Concurrence: Chief Justice Castille, joined by Justice Greenspan
 - Concurrence: Justice Greenspan, joined by Justice McCaffery
 - Concurrence and Dissent: Justice Saylor
 - Justice Todd did not participate in the consideration or decision of this case.
 - *Beyers v. Richmond*, 937 A.2d 1082, 1091–93 (Pa. 2007) (holding that the Unfair Trade Practices and Consumer Protection Law did not apply to attorneys practicing law because the General Assembly did not have constitutional authority to regulate attorney conduct, given the Supreme Court’s “exclusive constitutional authority to regulate [and monitor] the practice of law” under article V, section 10(c)).
 - Majority: Justice Fitzgerald, joined by Justice Castille & Justice Baldwin
 - Concurrence: Chief Justice Cappy, joined by Justice Baer (agrees with the majority “to the extent that it holds that as a matter of statutory construction, the [UTPCPL] does not apply to attorneys practicing law”) (citations omitted).
 - Dissent: Justice Eakin, joined by Justice Saylor
 - Dissent: Justice Saylor
 - *Commonwealth v. Whitmore*, 912 A.2d 827, 832, 834 (Pa. 2006) (finding the Superior Court lacked authority to sua sponte order a new judge be assigned to preside over resentencing of defendant because such authority is within the Supreme Court’s article V,

2018]

STILL LIVING

373

- section 10(c) general supervisory and administrative power over all courts).
- Majority: Justice Newman, joined by Justice Castille, Justice Saylor, Justice Eakin, Justice Baer & Justice Baldwin
 - Concurrence: Chief Justice Cappy
 - *Stilp v. Commonwealth*, 905 A.2d 918, 949 (Pa. 2006) (holding that the statute (Act 72 of 2005) repealing legislation that increased salaries for judiciary was unconstitutional “to the extent that it diminished judicial compensation” pursuant to article V, section 16(a)).
 - Majority: Justice Castille, joined by Justice Newman, Justice Eakin, Justice Baer & Justice Baldwin
 - Concurrence and Dissent: Justice Saylor
 - Chief Justice Cappy did not participate in the consideration or decision of this matter.
 - *Payne v. Commonwealth Dep’t of Corr.*, 871 A.2d 795, 804–05 (Pa. 2005) (determining that sections 6605(a)–(c) of the Prison Litigation Reform Act (“PRLA”), which contained a procedure for the “automatic dissolution” of preliminary injunctions after ninety days, was unconstitutional because it “intrudes upon this Court’s exclusive rulemaking authority granted under Article V, Section 10(c)”).
 - Majority: Chief Justice Cappy, joined by Justice Eakin, Justice Baer, Justice Castille, Justice Nigro, Justice Newman, and in Parts V–VII by Justice Saylor
 - Concurring in part and in the result: Justice Saylor
 - *Shaulis v. Pa. State Ethics Comm’n*, 833 A.2d 123, 132 (Pa. 2003), *modified*, *Yocum v. Commonwealth*, 61 A.3d 228, 244 n.10 (Pa. 2017) (holding that section 1103(g) of the Ethics Act was unconstitutional in violation of article V, section 10, because it imposed restrictions upon former government employees who are also attorneys and thus, specifically targeted attorneys).
 - Majority: Justice Newman, joined by Chief Justice Cappy, Justice Castille, in Part II by Justice Lamb, and in Part I by Justice Eakin
 - Concurrence: Justice Lamb
 - Concurrence and Dissent: Justice Eakin
 - Dissent: Justice Saylor, joined by Justice Nigro
 - *In re Melograne*, 812 A.2d 1164, 1169 (Pa. 2002) (holding that the Court of Judicial Discipline lacked the authority to disbar a judge pursuant to article V, section 10(c) based on his conviction of a felony: conspiracy to violate civil rights).

- Majority: Justice Cappy, joined by Justice Newman & Justice Eakin
- Concurrence: Chief Justice Zappala
- Concurrence and Dissent: Justice Saylor, joined by Justice Nigro
- Justice Castille did not participate in the consideration or decision of this matter.
- *Gmerek v. State Ethics Comm'n*, 807 A.2d 812, 813, 819 (Pa. 2002) (affirming lower court decision by equally divided court that Lobbying Disclosure Act violated Supreme Court's exclusive authority to regulate the practice of law under article V, section 10).
 - Per Curiam: Chief Justice Zappala, joined by Justice Cappy in support of affirmance
 - Opinion in Support of Affirmance: Justice Castille
 - Opinion in Support of Reversal: Justice Saylor, joined by Justice Nigro & Justice Newman
 - Former Chief Justice Flaherty did not participate in the decision of this matter.
- *First Judicial Dist. of Pa. v. Pa. Human Relations Comm'n*, 727 A.2d 1110, 1112 (Pa. 1999) (holding that the Human Relations Commission had no jurisdiction to adjudicate any complaints against the judicial branch because of the separation of powers doctrine).
 - Majority: Chief Justice Flaherty, joined by Justice Cappy, Justice Castille, Justice Nigro, Justice Newman & Justice Saylor
 - Concurring in result: Justice Zappala
- *In re Suspension of Capital Unitary Review Act*, 722 A.2d 676, 678 (Pa. 1999) (holding that CURA violated article V, section 10 by directly conflicting with existing procedural rules established by SCOPA).
 - Per curiam: Justice Castille
 - Concurring in the result: Justice Zappala & Justice Nigro
- *Commonwealth v. Stern*, 701 A.2d 568, 573 (Pa. 1997) (holding that section 4117(b)(1) of the Crimes Code prohibiting payment for referrals violated separation of powers, under article V, section 10, as the Supreme Court has exclusive authority to supervise conduct of attorneys).
 - Majority: Justice Zappala, joined by Chief Justice Flaherty, Justice Cappy, Justice Castille, Justice Nigro & Justice Newman

2018]

STILL LIVING

375

- Court of Common Pleas of Erie Cty. v. Pa. Human Relations Comm’n, 682 A.2d 1246, 1247–48 (Pa. 1996) (finding that the separation of powers doctrine, embodied in article V, section 10, prohibited PHRC from deciding a Pennsylvania Human Rights Act discrimination claim filed by a juvenile probation officer employed by the Court of Common Pleas).
 - Majority: Justice Nigro, joined by Justice Flaherty & Justice Castille
 - Concurrence: Justice Cappy
 - Dissent: Justice Zappala
 - Former Chief Justice Nix and Justice Newman did not participate in the consideration or decision of this case.
- Pa. State Ass’n of Cty. Comm’rs v. Commonwealth, 681 A.2d 699, 700–01 (Pa. 1996) (granting “petition for mandamus and order[ing] that the General Assembly enact a funding scheme for the court system on or before January 1, 1998,” based on its prior holding in *County of Allegheny v. Commonwealth*, 534 A.2d 760 (1987) that the existing funding system violated article V, section 1).
 - Per Curiam: Justice Flaherty, joined by Justice Zappala, Justice Nigro & Justice Newman
 - Concurrence: Justice Newman
 - Dissent: Chief Justice Nix, joined by Justice Castille
 - Dissent: Justice Castille, joined by Chief Justice Nix
 - Justice Cappy did not participate in this Order.
- Commonwealth *ex rel.* Jiuliante v. County of Erie, 657 A.2d 1245, 1252 (Pa. 1995) (“We are persuaded that the constitutional scheme of separation of powers, which preserves the independence of the judiciary, warrants recognition of a limited exception to the general rule and therefore hold that attorney’s fees may be awarded in a successful action challenging conduct which genuinely threatens or interferes with the inherent authority of the judiciary.”).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty, Justice Cappy, Justice Castille & Justice Montemuro (sitting by designation)
 - Justice Papadakos did not participate in the decision of the case.
- *In re Act 147 of 1990*, 598 A.2d 985, 990 (Pa. 1991) (“Act 147 is unconstitutional and violates the separation of powers doctrine [under article V, sections 2 and 10] in our Constitution because it attempts to place constables within the judicial branch of

- government and under the supervisory authority of the judicial branch.”).
- Per Curiam: Justice Papadakos, joined by Justice Flaherty, Justice Zappala & Justice Cappy
 - Concurring in the result: Justice McDermott
 - Dissent: Justice Larsen
 - Chief Justice Nix did not participate in the consideration or decision of this matter.
- *Office of Disciplinary Counsel v. Anonymous Attorney A*, 595 A.2d 42, 46–47, 49 (Pa. 1991) (holding that because article V, section 18 “mandates the procedure for bringing disciplinary actions against judicial officers[,]” and “[n]o other body or agency has jurisdiction to bring an action against a judicial officer for misconduct[,]” the Office of Disciplinary Counsel could not proceed against attorneys after they were removed from judicial office).
 - Majority: Justice Cappy, joined by Chief Justice Nix, Justice Larsen, Justice Flaherty & Justice Zappala
 - Dissent: Justice Papadakos
 - Justice McDermott did not participate in the consideration or decision of the appeals considered herein.
 - *Goodheart v. Casey*, 555 A.2d 1210, 1210–11, 1215 (Pa. 1989) (holding that State Employees’ Retirement Code of 1974, “which reduced pension benefits for members of the Commonwealth judiciary[,]” violated separation of powers pursuant to article V, section 16(a)).
 - Per Curiam: Chief Justice Nix, joined by Justice Flaherty & Justice Flaherty
 - Concurring in the result: Justice Larsen, Justice Zappala & Justice Papadakos
 - Dissent: Justice McDermott
 - *Klein v. Commonwealth*, 555 A.2d 1216, 1223 (Pa. 1989) (“We hold, therefore, that the two-tiered system of retirement benefits establishing radical disparities in the deferred compensation paid to the members of the two classes of judges . . . is unconstitutional as inimical to and destructive of the ‘unified judicial system’ mandated by Article V, section 1 of the Pennsylvania Constitution.”).
 - Majority: Justice Larsen, joined by Chief Justice Nix, Justice Flaherty & Justice Stout
 - Concurrence: Chief Justice Nix, joined by Justice Flaherty & Justice Stout

2018]

STILL LIVING

377

- Dissent: Justice McDermott
- *Sprague v. Casey*, 550 A.2d 184, 186, 192–94 (Pa. 1988) (ordering removal from the 1988 general election ballot of the offices of Justice of the Supreme Court and Judge of the Superior Court because “the vacancies, having occurred during the term of office, were required to be filled by gubernatorial appointment exercised in accordance with section 13(b) of Article V”).
 - Majority: Chief Justice Nix, joined by Justice Larsen, Justice Flaherty, Justice McDermott, Justice Zappala & Justice Papadakos
 - Justice Stout did not participate in the consideration or decision of this case.
- *County of Allegheny v. Commonwealth*, 534 A.2d 760, 763–65 (Pa. 1987) (holding statutory scheme obligating the county to fund courts within its judicial system was void as violative of constitutional mandate for unified judicial system under article V, section 1).
 - Majority: Justice Flaherty, joined by Justice Larsen & Justice Zappala
 - Dissent: Chief Justice Nix, joined by Justice McDermott
 - Dissent from denial of reargument: Justice Papadakos, joined by Chief Justice Nix & Justice McDermott
 - Justice Hutchinson did not participate in the decision of this case.
- *In re Subpoena on Judicial Inquiry & Review Bd.*, 517 A.2d 949, 950–51, 955 (Pa. 1986) (holding that constitutional authority under article V, section 13 providing that record of proceedings before the Judicial Inquiry and Review Board where no disciplinary action is recommended is permanently and absolutely confidential, must prevail over statutory authority, and thus, the Pennsylvania Crime Commission could not obtain confidential record of proceedings before Board with respect to investigation of judicial misconduct charge).
 - Majority: Justice Zappala, joined by Justice McDermott, Justice Hutchinson & Justice Papadakos
 - Chief Justice Nix & Justice Flaherty did not participate in the decision of this case.
 - Justice Larsen did not participate in the consideration of this case.
- *In re Casale*, 517 A.2d 1260, 1260–63 (Pa. 1986) (holding that the common pleas court lacked jurisdiction to require the defendant

- to appear at the office of the assistant district attorney and order suspect to submit handwriting exemplar).
- Majority: Justice Hutchinson, joined by Chief Justice Nix, Justice Larsen, Justice Flaherty, Justice McDermott, Justice Zappala & Justice Papadakos
 - *Commonwealth v. Lutz*, 495 A.2d 928, 935–36 (Pa. 1985) (holding that provisions of the Motor Vehicle Code that allowed local Courts of Common Pleas to establish their own rules applicable to the administration of the accelerated rehabilitative disposition (ARD) program in first offender drunk driving cases violated article V, section 10 because they were inconsistent with the rules adopted by the Pennsylvania Supreme Court).
 - Majority: Justice Flaherty, joined by Justice Larsen, Justice McDermott, Justice Hutchinson & Justice Papadakos
 - Concurring in part and dissenting in part: Chief Justice Nix, joined by Justice Zappala
 - *Kremer v. State Ethics Comm’n*, 469 A.2d 593, 594–96 (Pa. 1983) (holding that financial disclosure provisions of the Ethics Act, insofar as they are applied to judges, infringe on the Supreme Court’s power to supervise courts and are thus unconstitutional pursuant to article V, section 10 and separation of powers).
 - Majority: Justice Zappala, joined by Chief Justice Roberts, Justice Larsen, Justice Flaherty & Justice McDermott
 - Concurrence: Justice Larsen
 - Concurring in part and dissenting in part: Justice Hutchinson, joined by Justice Nix
 - *Mezvinsky v. Davis*, 459 A.2d 307, 309 (Pa. 1983) (holding that “the legislatively prescribed system requiring election of judges to the Commonwealth Court and precluding *all* of the electors from participating in the selection of the candidates for each vacancy on that court is contrary to the mandate of [article V] Section 13(a)”).
 - Majority: Justice Flaherty, joined by Justice Nix & Justice Larsen
 - Concurrence: Justice Zappala
 - Dissent: Chief Justice Roberts, joined by Justice McDermott & Justice Hutchinson
 - *Commonwealth v. Sorrell*, 456 A.2d 1326, 1327–29 (Pa. 1982) (holding that 42 Pa. C.S. § 5104(c), which “conferr[ed] upon the prosecution an absolute right to a jury trial” that could overrule a defendant’s decision to waive this right, was unconstitutional

- pursuant to article V, section 10(c), which establishes “general supervisory and administrative authority over all the courts”).
- Majority: Justice Roberts, joined by Chief Justice O’Brien, Justice Larsen & Justice Flaherty
 - Dissent: Justice Nix, joined by Justice Hutchinson
 - Dissent: Justice McDermott
 - *Wajert v. State Ethics Comm’n*, 420 A.2d 439, 441–42 (Pa. 1980) (“We are persuaded the [Ethics Act] was intended to apply to former judges, but, when so interpreted, it is unconstitutional. . . . There can be no doubt that the statute has infringed on this Court’s exclusive power to govern the conduct of an attorney, and is, hence, unconstitutional.”).
 - Majority: Chief Justice Eagen, joined by Justice O’Brien, Justice Roberts, Justice Nix, Justice Larsen, Justice Flaherty & Justice Kauffman
 - *In re* 42 Pa. C.S. § 1703, 394 A.2d 444, 446–47 (Pa. 1978) (Supreme Court writes a direct letter to the General Assembly and to the Governor expressing the view that the provision of the Public Agency Open Meeting Law that made the Supreme Court a “covered agency” when exercising its rule-making authority, and thus subject to the requirement that it make its meetings public, violated article V, section 10(c)).
 - Unanimous letter
 - *Leedom v. Thomas*, 373 A.2d 1329, 1330–32 (Pa. 1977) (granting writ of quo warranto, removing respondent from office, and declaring relator—who had been elected—entitled to the office of district justice of the peace for a magisterial district pursuant to article V, section 13, which mandates that judicial offices be filled by election).
 - Per curiam: Chief Justice Eagen, Justice O’Brien, Justice Roberts, Justice Pomeroy & Justice Manderino
 - Dissent: Justice Nix
 - *Flegal v. Dixon*, 372 A.2d 406, 407–08 (Pa. 1977) (holding the Magisterial District Reform Act, which prohibits a person from filing nominating petitions until that person has successfully completed the course of training and instruction and passed examination, violated article V, section 12(b), requiring only that a course of training and instruction be completed and examination passed “[p]rior to assuming office”).
 - Per curiam, before Chief Justice Eagen, Justice O’Brien, Justice Roberts, Justice Pomeroy, Justice Nix & Justice Manderino

- Commonwealth v. Sutley, 378 A.2d 780, 782 (Pa. 1977) (holding that amended statute, reducing penalties for possession of marijuana, was unconstitutional because it “fatally interferes with final judgments of the judiciary” and thus violated separation of powers doctrine).
 - Majority: Justice Nix, joined by Justice Eagen, Justice O’Brien & Justice Pomeroy
 - Concurrence: Justice Pomeroy
 - Dissent: Justice Roberts
 - Dissent: Justice Manderino
 - Former Chief Justice Jones did not participate in the decision of this case.
- Commonwealth *ex rel.* Specter v. Vignola, 285 A.2d 869, 872 (Pa. 1971) (holding that governor could not remove the president judge of traffic court during his fixed five-year term pursuant to section 16(i) of the Schedule to Judiciary article V).
 - Majority: Chief Justice Bell, joined by Justice Jones, Justice O’Brien & Justice Barbieri
 - Dissent: Justice Eagen
 - Dissent: Justice Roberts, joined by Justice Pomeroy

D. Limits on Legislative Process

- Hosp. & Healthsystem Ass’n of Pa. v. Dep’t of Pub. Welfare, 888 A.2d 601, 603, 615–16 (Pa. 2005) (holding General Appropriations Act of 2002 violated article III, section 11, which requires that a “general appropriation bill shall embrace *nothing* but appropriations” because the legislature improperly attempted to impose certain reimbursement rates for emergency services by out-of-network hospitals) (emphasis added).
 - Majority: Justice Baer, joined by Chief Justice Cappy, Justice Castille, Justice Nigro, Justice Newman, Justice Saylor & Justice Eakin
- Indep. Oil & Gas Ass’n of Pa. v. Bd. of Assessment Appeals of Fayette Cty., 814 A.2d 180, 184–85 (Pa. 2002) (determining that the Board did not have the authority to impose real estate tax in question, which was an *ad valorem* tax on oil and gas interests and the tax was unconstitutional).
 - Majority: Chief Justice Zappala, joined by Justice Cappy, Justice Castille, Justice Newman & Justice Eakin
 - Concurrence: Justice Nigro, joined by Justice Saylor
- W. Shore Sch. Dist. v. Pa. Labor Relations Bd., 626 A.2d 1131, 1135–36 (Pa. 1993) (“Under section 7(b) [of the Sunset Act] as

drafted, the legislature need not seek the Governor's approval for any adopted resolution. Merely the passage of a resolution by both chambers would reestablish an agency set for termination. . . . [W]e hold that section 7(b) as drafted violates Article 3, Section 9 of our State Constitution.”).

- Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty, Justice Papadakos & Justice Cappy
- Concurring in the result: Justice Larsen
- Justice McDermott did not participate in the decision of this case.
- Commonwealth v. Sessoms, 532 A.2d 775, 776, 782 (Pa. 1987) (striking down provisions of the Sentencing Code where its guidelines resulted from a legislative rejection resolution that was not presented to the Governor, which violated article III, section 9).
 - Majority: Justice Zappala, joined by Justice Papadakos, Chief Justice Nix, Justice Flaherty & Justice McDermott
 - Concurrence: Justice Papadakos
 - Concurring in part and dissenting in part: Justice Hutchinson
 - Dissent: Justice Larsen
- Consumers Educ. & Protective Ass'n v. Nolan, 368 A.2d 675, 685 (Pa. 1977) (In reviewing claim that Senate vote was invalid because of Sunshine Law the Court “observe[d] that even were [it] to agree that the meeting in question was subject to the Sunshine Law so as to invalidate the committee vote there taken, appellants provide no authority for a judicial holding that the subsequent confirmation vote, taken by the Senate as a whole as provided by the Constitution, was similarly invalid.”).
 - Majority: Justice Eagen, joined by Justice Roberts, Chief Justice Jones, Justice O'Brien, Justice Nix & Justice Manderino
 - Concurrence: Justice Roberts
 - Dissent: Justice Pomeroy
- Frame v. Sutherland, 327 A.2d 623, 626 (Pa. 1974) (“We hold that the Senate’s attempt to adjourn sine die failed because of the absence of consent by the House of Representatives. Our holding rests on a conclusion that the Constitution prohibits either house from adjourning sine die without the consent of the other.”).
 - Majority: Justice Roberts, joined by Chief Justice Jones & Justice O'Brien
 - Concurring in the result: Justice Pomeroy

- Dissent: Justice Nix
- Dissent: Justice Eagen
- Justice Manderino did not participate in the consideration or decision of this case.

E. Limits on Executive Action

- *Pittman v. Pa. Bd. of Prob. & Parole*, 159 A.3d 466, 467–68, 474 (Pa. 2017) (construing Subsection 6138(a)(2.1) of 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”).
 - Majority: Justice Baer, joined by Justice Todd, Justice Donohue & Justice Dougherty
 - Concurring in the result: Chief Justice Saylor, joined by Justice Todd
 - Concurring in part and dissenting in part: Justice Mundy, joined by Justice Wecht
- *Scarnati v. Wolf*, 173 A.3d 1110, 1112, 1135–36 (Pa. 2017) (holding that the Governor’s attempted partial vetoes of the proposed General Appropriations Act of 2014 did not adhere to the requirements set forth in article IV, section 15 of the state constitution).
 - Majority: Justice Wecht, joined by Justice Todd, Justice Mundy, Chief Justice Saylor (Parts I and III), Justice Baer (Parts I and III) & Justice Donohue (Parts I and II)
 - Concurrence: Chief Justice Saylor
 - Concurrence: Justice Donohue
 - Concurrence and dissent: Justice Baer, joined by Justice Dougherty
- *Arneson v. Wolf*, 124 A.3d 1225, 1227–28 (Pa. 2015) (adopting Commonwealth Court’s opinion that the Governor could not terminate the Executive Director of the Office of Open Records (OOR) in accordance with the Right to Know Law (RTKL) and the state constitution under article VI, sections 1 and 7 because the Office is “a unique and *sui generis* independent body, [insulated] from the Governor’s constitutional power to remove his appointees at-will”).
 - Majority: Justice Baer, joined by Chief Justice Saylor & Justice Eakin
 - Dissent: Justice Todd

2018]

STILL LIVING

383

- Justice Stevens did not participate in the consideration or decision of the case.
- *Jubelirer v. Rendell*, 953 A.2d 514, 537 (Pa. 2008) (holding that the Governor is not constitutionally authorized under article IV, section 16 to veto portions of the language defining a specific appropriation in an appropriations bill “without disapproving the funds with which the language is associated”).
 - Majority: Chief Justice Castille, joined by Justice Saylor, Justice Eakin, Justice Baer, Justice Todd & Justice McCaffery
- *Perzel v. Cortes*, 870 A.2d 759, 765 (Pa. 2005) (holding that the Secretary of Commonwealth’s rejection of the Writ of Election to fill a vacancy in the General Assembly “offends the separation of powers” because such authority is vested exclusively in General Assembly pursuant to article II, section 2).
 - Majority: Justice Newman, joined by Chief Justice Cappy, Justice Castille, Justice Nigro, Justice Saylor, Justice Eakin & Justice Baer

F. Limits on Municipal Action

- *Buckwalter v. Borough of Phoenixville*, 985 A.2d 728, 729, 733 (Pa. 2009) (invalidating an ordinance that eliminated pay to council members because it violated article III, section 27’s limitation that no “law,” which includes municipal ordinances, shall decrease a public officer’s salary after election or appointment).
 - Majority: Justice Eakin, joined by Chief Justice Castille, Justice Baer, Justice Todd, Justice McCaffery & Justice Greenspan
 - Concurrence: Justice Saylor
- *Pa. Gaming Control Bd. v. City Council of Phila.*, 928 A.2d 1255, 1258, 1270 (Pa. 2007) (enjoining city council from using an ordinance to place a question on the ballot regarding the location of gaming facilities because the ordinance was an “unlawful and unconstitutional exercise of power” under the home rule charter provision of article IX, section 2).
 - Majority: Chief Justice Cappy, joined by Justice Eakin, Justice Baldwin & Justice Fitzgerald
 - Concurrence: Justice Baer
 - Dissent: Justice Castille
 - Dissent: Justice Saylor
- *S. Newton Twp. Electors v. S. Newton Twp. Supervisor*, 838 A.2d 643, 644, 649 (Pa. 2003) (holding that Section 503 of the Second

Class Township Code, “which provides for the recall of a township supervisor,” violated article VI, section 7 and its provision for the “exclusive method of removal for elected officials”).

- Majority: Chief Justice Cappy, joined by Justice Castille, Justice Nigro, Justice Newman & Justice Saylor
- Dissent: Justice Lamb
- Justice Eakin did not participate in the consideration or decision of this case.
- *Eakin v. Keller*, 730 A.2d 953, 954–55, 958 (Pa. 1999) (pursuant to article III, section 27, a district attorney could not receive a salary increase from a statute enacted during the first year of his term).
 - Majority: Justice Zappala, joined by Chief Justice Flaherty, Justice Cappy, Justice Nigro & Justice Newman
 - Justice Castille did not participate in the decision of this case.
- *In re* Petition to Recall Reese, 665 A.2d 1162, 1167 (Pa. 1995) (“[I]n providing for recall the municipality of Kingston exceeded the powers conferred by Article IX, Section 2 and the Home Rule Charter and Optional Plans Law. This method of removal is specifically denied by the Constitution.”).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty, Justice Cappy, Justice Castille & Justice Montemuro (sitting by designation)
- *Clark v. Troutman*, 502 A.2d 137, 138–39, 141 (Pa. 1985) (granting petition to open a prior unappealed declaratory judgment based on an intervening decision by the Supreme Court holding unconstitutional raises in salary for county officials who were elected prior to the enactment of the salary-raising statute, because “[t]o hold otherwise in this case would not only perpetuate an error of constitutional dimension at public expense, but would place appellees in the unique position of being the only county officials in the Commonwealth who were elected prior to enactment of Act 223 who may receive salaries at the increased rate prescribed in that Act”).
 - Majority: Justice Flaherty, joined by Chief Justice Nix, Justice Larsen, Justice Hutchinson, Justice Zappala & Justice Papadakos
 - Concurrence: Justice Hutchinson, joined by Justice McDermott
- *Bundy v. Belin*, 461 A.2d 197, 198, 204 n.15, 207 (Pa. 1983) (construing the Local Government Unit Debt Act in light of article IX, section 10 (local government debt) and “the principle that tax statutes are to be strictly construed and all doubts are to

2018]

STILL LIVING

385

be resolved in favor of the taxpayer, [to] find [that] the language in Section 505 . . . was enacted to clarify that unpaid tax anticipation notes, not converted into funding debt, may be included in the budget of the ensuing fiscal year” (footnote omitted)).

- Majority: Justice Nix, joined by Justice Flaherty, Justice McDermott, Justice Hutchinson & Justice Zappala
- Concurrence: Chief Justice Roberts
- Justice Larsen did not participate in the consideration or decision in this case.
- *Bakes v. Snyder*, 403 A.2d 1307, 1309, 1314 (Pa. 1979) (rejecting county officials’ claim to a salary increase under Act 223 by construing that provision to avoid a constitutional conflict with article III, section 27—which prohibits sitting officials from receiving a salary increase while in office—in accordance with “the traditional presumption that the Legislature does not intend an unconstitutional result”).
 - Majority: Justice Roberts, joined by Chief Justice Eagen, Justice O’Brien, Justice Nix & Justice Manderino
 - Dissent: Justice Larsen
- *Citizens Comm. to Recall Rizzo v. Bd. of Elections of Phila.*, 367 A.2d 232, 246–50 (Pa. 1976) (plurality opinion) (in separate opinions, the Court held that the recall provisions of the Philadelphia Home Rule Charter were unconstitutional under article VI, section 7).
 - Majority: Chief Justice Jones
 - Concurrence: Justice O’Brien
 - Concurrence: Justice Nix, joined by Justice Manderino
 - Dissent: Justice Eagen
 - Dissent: Justice Roberts
 - Dissent: Justice Pomeroy

II. DECLARATION OF RIGHTS AND SUBSTANTIVE LIMITS

A. *Art. I, § 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*”]

1. Substantive Limits on Undue Oppression

- *Hosp. & Healthsystem Ass’n of Pa. v. Commonwealth*, 77 A.3d 587, 604, 606 (Pa. 2013) (holding that medical providers had “a vested entitlement under the Due Process Clause [article I, section 1] to have [MCARE Fund] money utilized in the manner directed by statute,” but remanding the issue of whether reallocation of alleged “surplus” from the MCARE fund to the General Fund actually violated these rights, rendering the legislation unconstitutional).
 - Majority: Justice Saylor, joined by Chief Justice Castille, Justice Eakin & Justice McCaffery
 - Dissent: Justice Baer
 - Dissent: Justice Todd
 - Justice Melvin did not participate in the decision of this case.
- *Township of Exeter v. Zoning Hearing Bd. of Exeter Twp.*, 962 A.2d 653, 659, 663 (Pa. 2009) (striking down zoning ordinance that prohibited signs from exceeding 25 square feet because it constituted a de facto exclusion of billboards in violation of the billboard company’s article I, section 1 rights).
 - Majority: Chief Justice Castille, joined by Justice Saylor, Justice Baer, Justice Todd & Justice McCaffery
 - Dissent: Justice Eakin
- *Nixon v. Commonwealth*, 839 A.2d 277, 288–89 (Pa. 2003) (holding that the criminal records chapter of the Protective Services Act violated the non-fundamental article I, section 1 “right to pursue a lawful occupation” because it did not bear a substantial relationship to the state interest in protecting elderly citizens).
 - Majority: Justice Nigro, joined by Justice Saylor & Justice Lamb
 - Concurrence: Justice Castille
 - Concurrence in result: Chief Justice Cappy, joined by Justice Newman
 - Dissent: Justice Eakin

2018]

STILL LIVING

387

- *In re* Realen Valley Forge Greenes Assocs., 838 A.2d 718, 721, 727 (Pa. 2003) (holding that agricultural zoning designed to prevent development of property was “reverse spot zoning” outside the scope of municipality’s proper powers and violated article I, section 1).
 - Majority: Justice Lamb, joined by Chief Justice Cappy, Justice Castille & Justice Eakin
 - Dissent: Justice Saylor
 - Justice Nigro and Justice Newman did not participate in the consideration or decision of this case.
- *In re Adoption of R.B.F.*, 803 A.2d 1195, 1196–97, 1201–03 (Pa. 2002) (construing Adoption Act to find that in same-sex second-parent adoption the legal parent need not relinquish parental rights; avoiding challenge under article I, section 1).
 - Majority: Chief Justice Zappala, joined by Justice Cappy, Justice Castille, Justice Newman & Justice Saylor
 - Concurring in the result: Justice Nigro
 - Justice Eakin did not participate in the consideration or decision of this case.
- *C & M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 158–59 (Pa. 2002) (holding that zoning ordinance’s one-acre minimum lot size was not reasonable or substantially related to township’s interest in preserving its agricultural lands and activities and thus constitutionally invalid).
 - Majority: Justice Nigro, joined by Chief Justice Zappala, Justice Cappy, Justice Castille, Justice Newman, Justice Saylor & Justice Eakin
- *Mahony v. Township of Hampton*, 651 A.2d 525, 526, 528 (Pa. 1994) (holding zoning ordinance that prohibited private enterprise from operating gas wells in residential districts but permitted public operation of wells was an invalid exercise of police power).
 - Majority: Justice Flaherty, joined by Justice Papadakos, Justice Castille & Justice Montemuro (sitting by designation)
 - Dissent: Justice Cappy, joined by Chief Justice Nix
 - Justice Zappala did not participate in the consideration or decision of this case.
- *Pa. Nw. Distribs. v. Zoning Hearing Bd. of Moon*, 584 A.2d 1372, 1376–77 (Pa. 1991) (holding “that the amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the Pennsylvania Constitution,” article I, section 1, and therefore reversing the lower court

- decisions upholding township's finding that adult bookstore was out of compliance with a newly enacted ordinance).
- Majority: Justice Larsen, joined by Justice Flaherty, Justice Zappala & Justice Cappy
 - Concurrence: Chief Justice Nix, joined by Justice Papadakos
 - Concurring in part and dissenting in part: Justice McDermott
- *In re Appeal of Shore*, 573 A.2d 1011, 1013 (Pa. 1990) (affirming the lower court ruling that zoning ordinance improperly prohibited the development of mobile home parks).
 - Majority: Justice Zappala, joined by Justice Flaherty
 - Concurrence: Chief Justice Nix
 - Concurrence: Justice McDermott, joined by Justice Papadakos
 - Dissent: Justice Larsen
 - Justice Stout did not participate in the decision of this case.
 - *Council of Middletown Twp. v. Benham*, 523 A.2d 311, 316–17 (Pa. 1987) (construing “public sanitary sewer system” in zoning ordinance to not limit systems to existing government-owned systems because “if a municipality is to have a monopoly on the service, it must provide it in a reasonable manner”).
 - Majority: Justice Hutchinson, joined by Chief Justice Nix, Justice Flaherty & Justice Zappala
 - Concurring in the result: Justice Papadakos
 - Justice Larsen & Justice McDermott did not participate in the consideration or decision of this case.
 - *Craig v. Magee Mem'l Rehab Ctr.*, 515 A.2d 1350, 1353 (Pa. 1986) (holding damages for delay under Rule 238 violated due process and altered the substantive rights of litigants).
 - Majority: Justice McDermott, joined by Chief Justice Nix, Justice Flaherty & Justice Zappala
 - Concurring in the result: Justice Hutchinson
 - Dissent: Justice Larsen, joined by Justice Papadakos
 - *In re Baby Girl D*, 517 A.2d 925, 927 (Pa. 1986) (construing the 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, as “it is every American's right not to be bought or sold” pursuant to article I, section 1).
 - Majority: Justice Flaherty, joined by Chief Justice Nix, Justice Larsen & Justice McDermott
 - Dissent: Justice Hutchinson, joined by Justice Zappala & Justice Papadakos

- *Geiger v. Zoning Hearing Bd. of N. Whitehall Twp.*, 507 A.2d 361, 365 (Pa. 1986) (holding that the zoning ordinance unconstitutionally excluded use of mobile homes on individual lots, and unconstitutionally discriminated against property owners who wished “to permanently affix a mobile home to their realty and make improvements rendering the structure immobile”).
 - Majority: Justice McDermott, joined by Chief Justice Nix, Justice Flaherty, Justice Hutchinson & Justice Zappala
 - Concurrence: Justice Larsen
 - Concurrence: Justice Hutchinson
 - Concurring in the result: Justice Papadakos
- *Fernley v. Bd. of Supervisors of Schuylkill Twp.*, 502 A.2d 585, 586 (Pa. 1985) (holding that the township zoning ordinance, which prohibited multi-family dwellings, was unconstitutional).
 - Majority: Justice Hutchinson, joined by Chief Justice Nix, Justice Larsen, Justice Flaherty & Justice Papadakos
 - Concurrence: Chief Justice Nix
 - Concurring in part and dissenting in part: Justice McDermott, in the dissent joined by Justice Zappala
 - Concurring in part and dissenting in part: Justice Zappala, joined in the dissent by Justice McDermott
- *Krenzelak v. Krenzelak*, 469 A.2d 987, 994 (Pa. 1983) (refusing to retroactively apply new legislation to conveyances before effective date of new Divorce Code so as to avoid due process conflict).
 - Majority: Justice Hutchinson, joined by Chief Justice Roberts, Justice Larsen, Justice McDermott & Justice Zappala
 - Concurrence: Justice Nix
 - Concurrence: Justice Flaherty, joined by Justice Larsen
- *Hopewell Twp. Bd. of Supervisors v. Golla*, 452 A.2d 1337, 1343 (Pa. 1982) (“[T]he restrictions on landowner rights imposed by the [township zoning] ordinance in question are too severe to be regarded as ‘clearly necessary’ when their burdens are balanced against the public interest sought to be protected; hence, they do not meet the standard constitutionally required of municipal zoning ordinances.”).
 - Majority: Justice Flaherty, joined by Chief Justice O’Brien & Justice Roberts
 - Concurrence: Justice Hutchinson, joined by Justice Nix
 - Concurring in part and dissenting in part: Justice Larsen

- Dissent: Justice McDermott
- *Surrick v. Zoning Hearing Bd. of Upper Providence*, 382 A.2d 105, 106–07 (Pa. 1977) (holding township ordinance unconstitutionally excluded multi-family dwellings in violation of article I, section 1).
 - Majority: Justice Nix, joined by Justice Eagen & Justice O’Brien
 - Concurring in the result: Justice Manderino
 - Concurrence: Justice Roberts
 - Chief Justice Jones did not participate in the decision of this case.
 - Justice Pomeroy did not participate in the consideration or decision of this case.
- *Township of Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466, 468–69 (Pa. 1975) (holding zoning ordinance to be unconstitutionally exclusionary when it provided for apartment construction in only eighty out of the 11,589 acres in the township).
 - Majority: Justice O’Brien, joined by Justice Eagen & Justice Nix
 - Concurrence: Justice Roberts
 - Concurring in the result: Justice Manderino
 - Dissent: Justice Pomeroy
 - Chief Justice Jones did not participate in the consideration or decision of this case.
- *Casey v. Zoning Hearing Bd.*, 328 A.2d 464, 469–70 (Pa. 1974) (upholding landowner’s attack on a zoning ordinance and finding it unconstitutional, but remanding the issue of the requested building permit to the Zoning Hearing Board because “the right thereto is conditioned on other prior approvals which have not been given”).
 - Majority: Justice Eagen, joined by Justice O’Brien, Justice Roberts, Justice Nix & Justice Manderino
 - Concurring in the result: Justice Pomeroy
 - Dissent: Chief Justice Jones
- *Commonwealth v. Harmar Coal Co.*, 306 A.2d 308, 316 (Pa. 1973) (construing Clean Streams Law and the Sanitary Water Board’s denial of coal companies’ applications for mine drainage permits as a constitutional regulation to promote general welfare of the community).

2018]

STILL LIVING

391

- Majority: Chief Justice Jones, joined by Justice Eagen, Justice O'Brien, Justice Roberts, Justice Pomeroy & Justice Nix
- Justice Manderino did not participate in the consideration or decision of these cases.
- Pa. State Bd. of Pharm. v. Pastor, 272 A.2d 487, 489, 495 (Pa. 1971) (holding a statute that made it unlawful for pharmacists to advertise prices of dangerous drugs was an unreasonable exercise of police power and therefore unconstitutional).
 - Majority: Justice Roberts, joined by Chief Justice Bell, Justice Eagen, Justice O'Brien & Justice Pomeroy
 - Dissent: Justice Jones
 - Justice Cohen did not participate in the decision of this Case.
- Beaver Gasoline Co. v. Zoning Board of Osborne, 285 A.2d 501, 505 (Pa. 1971) (remanding to the lower court to allow borough to produce additional evidence in order to meet its burden of showing that a zoning ordinance that operated as a total ban on gas stations anywhere within the limits of the borough "bears a relationship to the public health, safety, morals and general welfare[;]" otherwise the ordinance was unconstitutional).
 - Majority: Justice O'Brien, joined by Justice Eagen & Justice Roberts
 - Concurrence: Justice Jones, joined by Justice Pomeroy
 - Chief Justice Bell & Justice Barbieri did not participate in the consideration and decision of this case.
- Appeal of Girsh, 263 A.2d 395, 398–99 (Pa. 1970) (striking down as unreasonable a zoning scheme that failed to provide for apartments in an area of 4.64 square miles with a population of nearly 13,000 people).
 - Majority: Justice Roberts, joined by Chief Justice Bell, Justice Eagen & Justice O'Brien
 - Concurrence: Chief Justice Bell
 - Dissent: Justice Jones, joined by Justice Cohen & Justice Pomeroy
- Appeal of Kit-Mar Builders, Inc., 268 A.2d 765, 765–66 (Pa. 1970), *clarified by* C&M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd., 820 A.2d 143 (Pa. 2002) (zoning ordinance requiring lots of at least two acres along existing roads but at least three acres in the interior to be unconstitutional under article I, section 1 of the Pennsylvania Constitution and the Fifth and Fourteenth Amendments to the U.S. Constitution).

- Majority: Justice Roberts, joined by Chief Justice Bell, Justice Eagen, Justice O'Brien & Justice Pomeroy
- Concurrence: Chief Justice Bell (arguing that the zoning ordinance was an unconstitutional restriction on an owner's right of ownership and use of property under article I, section 1 and general welfare principles)
- Dissent: Justice Jones, joined by Justice Cohen

2. Procedural Limits

- *Pittman v. Pa. Bd. of Prob. & Parole*, 159 A.3d 466, 468, 474–75 (Pa. 2017) (construing Subsection 6138(a)(2.1) of the Parole Code “to honor the basic notions of due process” and holding that the Parole Board abused its discretion by failing to consider whether to grant credit for time spent at liberty on parole by a convicted parole violator).
 - Majority: Justice Baer, joined by Justice Todd, Justice Donohue & Justice Dougherty
 - Concurring in the result: Chief Justice Saylor, joined by Justice Todd
 - Concurring in part and dissenting in part: Justice Mundy, joined by Justice Wecht
- *City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Breary)*, 985 A.2d 1259, 1274 (Pa. 2009) (affirming decision to vacate grievance arbitration award to police union because city's procedural due process rights under article I, section 1 were violated by the arbitrator, who excluded critical evidence to the city despite the fact that the city cured any prejudice resulting from a discovery violation which was not done in bad faith).
 - Majority: Justice Baer, joined by Chief Justice Castille, Justice Saylor, Justice Todd & Justice Greenspan
 - Dissent: Justice Eakin, joined by Justice McCaffery
 - Dissent: Justice McCaffery
- *Lyness v. Commonwealth*, 605 A.2d 1204, 1204 (Pa. 1992) (“[A] violation of due process occurs under the Pennsylvania Constitution when an administrative board . . . determines that a professional licensing prosecution should be initiated, and then acts as the ultimate fact-finder in determining whether a violation has occurred” due to the “commingling of prosecutorial and adjudicative functions within a single multi-member administrative board . . .”).
 - Majority: Justice Cappy, joined by Justice Papadakos & Justice Zappala

2018]

STILL LIVING

393

- Concurrence: Justice Papadakos
- Dissent: Justice McDermott, joined by Justice Flaherty
- Chief Justice Nix & Justice Larsen did not participate in the consideration or decision of this case.
- Tracy v. County of Chester, 489 A.2d 1334, 1339 (Pa. 1985) (“The collection of taxes . . . may not be implemented without due process of law that is guaranteed in the Commonwealth and federal constitutions; and this due process, as we have stated here, requires at a minimum that an owner of land be actually notified by government, if reasonably possible, before his land is forfeited by the state. Reasonable efforts to effect actual notice were not carried out in this case, and the tax sale of this property must be set aside.”).
 - Majority: Justice Flaherty, joined by Chief Justice Nix, Justice McDermott, Justice Hutchinson & Justice Papadakos
 - Concurring in part and dissenting in part: Justice Zappala, joined by Justice Larsen
- Hardee’s Food Sys., Inc. v. Dep’t of Transp. of Pa., 434 A.2d 1209, 1212 (Pa. 1981) (holding the Department of Transportation violated “Hardee’s constitutionally protected right of access to a state highway” by denying its application for driveways without providing “reasonable notice of a hearing and an opportunity to be heard”).
 - Majority: Justice Kauffman, joined by Justice Nix, Justice Larsen & Justice Flaherty
 - Dissent: Justice Roberts
 - Chief Justice O’Brien & Justice Wilkinson did not participate in the consideration or decision of this case.
- Conestoga Nat’l Bank of Lancaster v. Patterson, 275 A.2d 6, 11 (Pa. 1971), *superseded by statute*, 71 PA. CONS. STAT. § 733-302(A)(2) (2012) (holding that Department of Banking order approving bank application to establish a branch constituted a “judicial determination involving substantial property rights” and violated due process without affording notice and a hearing to competing protesting banks).
 - Majority: Justice Roberts, joined by Justice Jones, Justice Eagen, Justice O’Brien & Justice Pomeroy
 - Dissent: Chief Justice Bell
 - Justice Cohen took no part in the decision of this case.

3. Reputation and Privacy

- *Reese v. Pennsylvanians For Union Reform*, 173 A.3d 1143, 1148, 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” prior to disseminating to the public a list of the names of all state employees as well as their position, date of birth, voting residence, salary, appointment date, whether he/she was continuously employed, periods of service, and positions held).
 - Majority: Justice Donohue, joined by Chief Justice Saylor, Justice Baer & Justice Dougherty
 - Concurrence: Justice Wecht, *id.* at 1160 (“[I]t is not the role of agencies or the legislature to adjudicate constitutional rights. . . . Executive branch agencies—like the Treasurer—are subject to constitutional limitations, which are expounded and interpreted by this Court.”).
 - Justice Todd did not participate in the decision of the case.
- *Pa. State Educ. Ass’n v. Commonwealth*, 148 A.3d 142, 158 (Pa. 2016) (finding that school employees’ home addresses were exempt from disclosure under the RTKL because there is a “right to informational privacy . . . guaranteed by Article I, Section 1 of the Pennsylvania Constitution, [which] may not be violated unless outweighed by a public interest favoring disclosure.”).
 - Majority: Justice Donohue, joined by Chief Justice Saylor, Justice Baer, Justice Todd & Justice Dougherty
 - Concurrence: Justice Wecht, *id.* at 160 (finding the case “is not one of statutory interpretation. It is one of constitutional right” as there is a right to privacy enshrined in article I, section 1).
- *In re J.B.*, 107 A.3d 1, 14, 16 (Pa. 2014) (determining that SORNA’s lifetime registration provision as applied to juvenile offender was an unconstitutional irrebuttable presumption, highlighting right to reputation under article I, section 1).
 - Majority: Justice Baer, joined by Chief Justice Castille, Justice Saylor, Justice Eakin & Justice Todd
 - Dissent: Justice Stevens
 - Justice McCaffrey did not participate in the decision of this case.
- *Carlacci v. Mazaleski*, 798 A.2d 186, 190 (Pa. 2002) (“[T]here exists a right to petition for expungement of a PFAA [Protection From Abuse Act] 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.”).
- Majority: Chief Justice Zappala, joined by Justice Flaherty, Justice Cappy, Justice Castille & Justice Nigro
 - Dissent: Justice Saylor, joined by Justice Newman
 - Dissent: Justice Newman
 - Justice Flaherty did not participate in the decision of this case.
- *In re* T.R., 731 A.2d 1276, 1281 (Pa. 1999) (“Compelling a psychological examination in this context [juvenile dependency dispositional review] is nothing more or less than social engineering in derogation of constitutional rights, and where, as here, there is an abundance of information about the ability of the parent to be a parent, there is no state interest, much less a compelling state interest, in the ordering of parental psychological examinations. In fact, we find such state intervention frightening in its Orwellian aspect.”).
 - Majority: Chief Justice Flaherty, joined by Justice Nigro & Justice Cappy
 - Concurrence: Justice Nigro
 - Concurring in result: Justice Zappala
 - Dissent: Justice Newman, joined by Justice Castille
 - *A.Y. v. Commonwealth*, 641 A.2d 1148, 1152 (Pa. 1994) (construing hearsay statute in light of the right to reputation in article I, section 1).
 - Majority: Senior Justice Montemuro (sitting by designation), joined by Chief Justice Nix, Justice Flaherty, Justice Zappala & Justice Cappy
 - Concurrence: Justice Castille, joined by Justice Papadakos
 - *John M. v. Paula T.*, 571 A.2d 1380, 1386 (Pa. 1990) (holding that a person’s privacy interests in preserving bodily integrity and the constitutional right to be free from unreasonable searches and seizure precluded court-ordered blood tests).
 - Majority: Justice Larsen, joined by Chief Justice Nix, Justice Flaherty, Justice McDermott, Justice Zappala & Justice Papadakos
 - Concurrence: Chief Justice Nix, joined by Justice Flaherty, Justice McDermott, Justice Zappala & Justice Papadakos
 - *Sprague v. Walter*, 543 A.2d 1078, 1084–85 (Pa. 1988) (declining to interpret the Shield Law privilege broadly to avoid conflict with article I, section 1, reasoning that the privilege was not intended to allow media defendant to use any of its sources and

- information as proof of verification or evidence of responsibility, but extrinsic evidence could be introduced in that regard without abandonment of privilege).
- Majority: Chief Justice Nix, joined by Justice Flaherty, Justice Zappala & Justice Papadakos
 - Did Not Participate: Justice Larsen, Justice McDermott & Justice Stout
 - *Hatchard v. Westinghouse Broad. Co.*, 532 A.2d 346, 351 (Pa. 1987) (construing Pennsylvania Shield Law to hold that unpublished documentary information was discoverable by plaintiff in libel action as long as the information did not reveal or could redact the identity of personal source of information).
 - Majority: Chief Justice Nix, joined by Justice Flaherty, Justice Zappala & Justice Papadakos
 - Concurring in the result: Justice Hutchinson
 - Justice Larsen & Justice McDermott did not participate in the consideration or decision of these cases.
 - *Denoncourt v. Commonwealth*, 470 A.2d 945, 950 (Pa. 1983) (holding “that the reporting provisions of the Ethics Act relating to family members [were] unconstitutional in that they violate the due process rights of the public official and the family’s right to privacy under Art. I § 1”).
 - Majority: Justice Flaherty, joined by Justice McDermott, Justice Zappala & Chief Justice Roberts (as to Part I)
 - Concurring in part and dissenting in part: Justice Hutchinson
 - Dissent: Justice Nix, joined by Justice Larsen
 - *In re “B”*, 394 A.2d 419, 425–26 (Pa. 1978) (establishing right to privacy under penumbras of various guarantees of the state constitution and barring disclosure of records of inpatient psychiatric treatment of juvenile’s mother).
 - Majority: Justice Manderino, joined by Justice Roberts & Justice Larsen
 - Concurrence: Justice Roberts
 - Concurring in the result: Justice O’Brien
 - Dissent: Chief Justice Eagen
 - Dissent: Justice Pomeroy, joined by Justice Nix
 - *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 a[n article I, section 1] right to the destruction of the hospital records which were created as a result of the illegal commitment”).

2018]

STILL LIVING

397

- Majority: Justice Larsen, joined by Justice Roberts, Justice Nix & Justice Manderino
- Dissent: Justice Pomeroy, joined by Chief Justice Eagen & Justice O'Brien

B. Art. I, § 3 [Religious Freedom]

- Commonwealth v. Eubanks, 512 A.2d 619, 622–23 (Pa. 1986) (grounding 42 PA. CONS. STAT. § 5902(b) (1976) in the First Amendment to the U.S. Constitution and article I, section 3 of the Pennsylvania Constitution to remand for a new trial because defendant was cross-examined with questions concerning his religion in violation of the legislation).
 - Majority: Justice Flaherty, joined by Chief Justice Nix, Justice McDermott, Justice Hutchinson & Justice Zappala
 - Concurrence: Justice McDermott
 - Dissent: Justice Larsen, joined by Justice Papadakos

C. Art. I, § 5 [Elections]

- League of Women Voters v. Commonwealth, 178 A.3d 737, 821 (Pa. 2018) (finding that the Pennsylvania Congressional Redistricting Act of 2011 violated the state constitution's free and equal elections clause in article I, section 5).
 - Majority: Justice Todd, joined by Justice Donohue, Justice Dougherty & Justice Wecht
 - Concurrence in part and dissent in part: Justice Baer
 - Dissent: Chief Justice Saylor, joined by Justice Mundy
 - Dissent: Justice Mundy
- League of Women Voters v. Commonwealth, 181 A.3d 1083, 1087 (Pa. 2018) (adopting a remedial plan for redistricting).
 - Per curiam
 - Dissent: Chief Justice Saylor
 - Dissent: Justice Baer
 - Dissent: Justice Mundy
- Applewhite v. Commonwealth, 54 A.3d 1, 5 (Pa. 2012) (vacating denial of injunction against implementation of photographic Voter ID, remanding constitutional question under article I, section 5).
 - Per curiam
 - Dissent: Justice Todd, joined by Justice McCaffery
 - Dissent: Justice McCaffery, joined by Justice Todd

- On remand: *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 Pa. Commw. Ct. LEXIS 756, at *49–50, 55, 72 (Pa. Commw. Ct. Jan. 17, 2014) (invalidating photographic Voter ID under article I, section 5; “all qualified electors;” and equal protection principles).
- *Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 715–16 (Pa. 2012) (finding the 2011 Legislative Reapportionment Plan is contrary to law, violating article II, section 17(d) because of subdivision splits that were not absolutely necessary).
 - Per curiam
 - Dissent in part, concurrence in part: Justice Saylor, joined by Justice Eakin & Justice Orié Melvin, *id.* at 716 (“I am not persuaded that the 2011 Legislative Reapportionment Plan is contrary to law as reflected in the existing precedent.”).
 - Dissent in part, concurrence in part: Justice Eakin
 - Dissent: Justice Orié Melvin

D. *Art. I, § 6 [Jury Trial]*

- *Blum ex rel. Blum v. Merrell Dow Pharm., Inc.*, 626 A.2d 537, 538 (Pa. 1993) (holding that article I, section 6 “entitles a party who properly demands a twelve person jury to a verdict from a jury of twelve persons”).
 - Majority: Chief Justice Nix, joined by Justice Larsen, Justice Papadakos, Justice Flaherty, Justice Zappala & Justice Cappy
 - Concurrence: Justice Larsen, joined by Justice Papadakos
 - Justice McDermott did not participate in the consideration or decision of this case.
- *Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984) (holding arbitration procedures of Health Care Services Malpractices Act was unconstitutional insofar as it applied to the regulation of attorney fees under article I, section 6, following *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980)).
 - Majority: Chief Justice Nix, joined by Justice Flaherty, Justice McDermott, Justice Zappala & Justice Papadakos
 - Concurring in the result: Justice Larsen
 - Dissent: Justice Hutchinson
- *Stein Enters., Inc. v. Golla*, 426 A.2d 1129, 1134 (Pa. 1981) (construing statute “to ensure that qualified parties would be able to take advantage of their right of appeal, regardless of their financial condition. In order to give full effect to the language and purpose of [section] 72, we hold that the costs of an appeal bond

and the arbitrators' fees are 'costs of the suit' under [section] 72.”).

- Majority: Justice Larsen, joined by Chief Justice O'Brien, Justice Roberts, Justice Nix, Justice Flaherty & Justice Kauffman
- *Mattos v. Thompson*, 421 A.2d 190, 195–96 (Pa. 1980) (“Today, we are satisfied that sufficient time has passed to allow for a meaningful evaluation and must regrettably conclude that the lengthy delay occasioned by the arbitration system therein does in fact burden the right of a jury trial with ‘onerous conditions, restrictions or regulations which . . . make the right practically unavailable.’ . . . We are compelled, therefore, to declare unconstitutional section 309 of the Act . . . giving the health care arbitration panels ‘original exclusive jurisdiction’ over medical malpractice claims because the delays . . . result in an oppressive delay and impermissibly infringes upon the constitutional right to a jury.” (alteration in original) (citations omitted)).
 - Majority: Justice Nix, joined by Justice O'Brien, Justice Flaherty & Justice Kauffman
 - Concurring in part and dissenting in part: Justice Larsen
 - Dissent: Justice Roberts, joined by Chief Justice Eagen
- *Weber v. Lynch*, 375 A.2d 1278, 1284 (Pa. 1977) (holding that Rule 303 J of the Allegheny County Court of Common Pleas violated the Arbitration Act, and that “[w]e need not here determine the extent of the legislature’s power to go beyond the present statute without impinging upon the constitutionally-protected right to trial by jury”).
 - Majority: Chief Justice Eagen, joined by Justice O'Brien, Justice Roberts, Justice Pomeroy, Justice Nix & Justice Manderino
 - Concurrence: Justice Roberts, joined by Justice Manderino

E. Art. I, § 7 [Free Expression]

- *DePaul v. Commonwealth*, 969 A.2d 536, 538, 552–53 (Pa. 2009) (finding provision of Race Horse Development and Gaming Act that “impose[d] upon a class of individuals affiliated with licensed gaming in Pennsylvania an absolute ban on political contributions” violated the state constitution’s protection of freedom of expression and association under article I, sections 7, 20, and 26).
 - Majority: Chief Justice Castille, joined by Justice Saylor, Justice Eakin, Justice Baer & Justice Todd

- Dissent: Justice McCaffery
- *Pap's A.M. v. City of Erie*, 812 A.2d 591, 603, 613 (Pa. 2002) (holding public nudity sections of city ordinance violated article I, section 7 protecting freedom of speech after employing *Edmunds* framework (citing *Commonwealth v. Edmunds*, 586 A.2d 887 (1991))).
 - Majority: Justice Castille, joined by Chief Justice Zappala, Justice Cappy, Justice Nigro & Justice Eakin
 - Dissent: Justice Saylor (would remand for an evidentiary hearing regarding alleged secondary effects of ordinance).
 - Justice Newman did not participate in the consideration or decision of this case.
- *Pa. State Police, Bureau of Liquor Control Enft v. Hosp. Invs. of Phila., Inc.*, 689 A.2d 213, 216–17 (Pa. 1997) (holding statute prohibiting advertising of liquor prices violated First Amendment and article I, section 7).
 - Majority: Justice Cappy, joined by Chief Justice Flaherty, Justice Zappala, Justice Castille, Justice Nigro & Justice Newman
 - Concurrence: Justice Castille
- *Ins. Adjustment Bureau v. Ins. Comm'r for Pa.*, 542 A.2d 1317, 1324 (Pa. 1988) (“Article I, Section 7, will not allow the prior restraint or other restriction of commercial speech by any governmental agency where the legitimate, important interests of government may be accomplished practicably in another, less intrusive manner. Since the legitimate governmental goals in this case could be accomplished by enforcement of civil, criminal and administrative remedies already in place, Commonwealth Court was in error in upholding the validity of the statute’s restriction on speech.”).
 - Majority: Justice Flaherty, joined by Chief Justice Nix, Justice Larsen, Justice McDermott, Justice Zappala & Justice Papadakos
 - Justice Stout did not participate in the consideration or decision of this case.
- *Commonwealth v. Tate*, 432 A.2d 1382, 1387 (Pa. 1981) (“[W]e are of the view that the Constitution of this Commonwealth protects appellants’ invaluable right to freedom of expression against the enforcement, by state criminal statute, of the college’s standardless permit requirement,” which had prevented them from distributing leaflets in outdoor campus grounds).

2018]

STILL LIVING

401

- Majority: Justice Roberts, joined by Chief Justice O'Brien, Justice Nix, Justice Flaherty & Justice Kauffman
- Dissent: Justice Larsen
- *Willing v. Mazzocone*, 393 A.2d 1155, 1157 (Pa. 1978) (determining that court order enjoining former client from demonstrating outside lawyer's office by carrying a "sandwich-board" sign was an invalid prior restraint on former client's speech).
 - Majority: Justice Manderino, joined by Justice O'Brien, Justice Roberts & Justice Pomeroy
 - Concurrence: Justice Roberts, joined by Justice O'Brien
 - Concurrence: Justice Pomeroy
 - Dissent: Chief Justice Eagen
 - Dissent: Justice Nix & Justice Larsen
- *Commonwealth ex rel. Davis v. Van Emberg*, 347 A.2d 712, 715–16 (Pa. 1975) (reversing decree enjoining operation of a print shop because "a blanket prohibition against the dissemination of all 'books, papers, magazines and all other materials' cannot be tolerated" under the First Amendment and article I, section 7 of the Pennsylvania Constitution).
 - Majority: Justice Roberts, joined by Justice Eagen, Justice O'Brien, Justice Pomeroy, Justice Nix & Justice Manderino
 - Chief Justice Jones did not participate in the consideration or decision of this case.
- *In re Appeal of Chalk*, 272 A.2d 457, 458 (Pa. 1971) (suspension of public assistance caseworkers for comments made at a public meeting was unconstitutional as the statements were constitutionally protected under article I, section 7).
 - Majority: Justice Roberts, joined by Justice Jones & Justice O'Brien
 - Concurring in the result: Justice Pomeroy
 - Dissent: Chief Justice Bell
 - Dissent: Justice Eagen
 - Justice Cohen did not participate in the decision of this case.

F. Art. I, § 10 [Taking]

- *Robinson Township v. Commonwealth*, 147 A.3d 536, 542 (Pa. 2016) ("[W]e determine that Section 3241 is unconstitutional on its face, as it grants a corporation the power of eminent domain to take private property for a private purpose, in violation of the Fifth Amendment of the United States Constitution and Article I, Sections 1 and 10 of the Pennsylvania Constitution . . .").

- Majority: Justice Todd, joined by Justice Donohue, Justice Dougherty & Justice Wecht
- Concurrence in part and dissent in part: Chief Justice Saylor (joined takings holding)
- Concurrence in part and dissent in part: Justice Baer (joined takings holding)
- Justice Eakin did not participate in the consideration or decision of this case.
- Reading Area Water Auth. v. Schuylkill River Greenway Ass'n, 100 A.3d 572, 583–84 (Pa. 2014) (construing Property Rights Protection Act in light of article I, section 10 to hold that the Act prohibited the water authority from using its eminent domain powers to condemn the easement).
 - Majority: Justice Saylor, joined by Chief Justice Castille, Justice Eakin, Justice Baer, Justice Todd, Justice McCaffery & Justice Stevens
- *In re* Opening Private Rd., 5 A.3d 246, 258 (Pa. 2010) (holding that Private Road Act would constitute unconstitutional taking in the absence of showing of public benefit).
 - Majority: Justice Saylor joined by Justice Todd, Justice McCaffery & Justice Orié Melvin
 - Dissent: Justice Eakin, joined by Chief Justice Castille & Justice Baer
- *In re* De Facto Condemnation & Taking of Lands of WBF Assocs. by Lehigh-Northampton Airport Auth., 903 A.2d 1192, 1211 (Pa. 2006) (holding that the failure of a landowner's real estate development project caused by announcement of airport expansion project constituted a de facto taking under article I, section 10, and landowner was unconstitutionally deprived of the "full and normal use" of his property).
 - Majority: Justice Newman, joined by Chief Justice Cappy, Justice Castille & Justice Baer
 - Concurrence and Dissent: Justice Saylor
 - Concurrence and Dissent: Justice Eakin
 - Justice Nigro did not participate in the decision of this case.
- Redevelopment Auth. of Oil City v. Woodring, 445 A.2d 724, 727–28 (Pa. 1982) (holding that city redevelopment authority's "decision requiring all electrical wires to be relocated underground . . . substantially deprived Mrs. Woodring of the use and enjoyment of her property, and that it thus constituted a taking within the meaning of the Eminent Domain Code").

2018]

STILL LIVING

403

- Majority: Justice Larsen, joined by Chief Justice O'Brien, Justice Roberts, Justice Nix, Justice Flaherty, Justice McDermott & Justice Hutchinson
- Concurrence: Justice Roberts, joined by Justice Nix & Justice Hutchinson
- *City of Chester v. Commonwealth*, 434 A.2d 695, 702 (Pa. 1981) (“As we believe the loss suffered by residents of any political subdivision from the taking of a road or bridge is no less real than the loss suffered by private individuals as condemnees, we hold that the Pennsylvania Constitution does not allow the Commonwealth to escape its financial obligation owed to a public condemnee for property taken.”).
 - Majority: Chief Justice O'Brien, joined by Justice Nix, Justice Larsen, Justice Flaherty & Justice Kauffman
 - Concurrence: Justice Nix
 - Dissent: Justice Roberts
- *Redevelopment Auth. of Phila. v. Lieberman*, 336 A.2d 249, 251, 258–59 (Pa. 1975) (condemnee whose retail liquor license lost value as a result of condemnation of premises for which the license was issued was entitled to have such loss considered in the award of just compensation to be paid by condemnor).
 - Majority: Justice Manderino, joined by Justice O'Brien, Justice Roberts, Justice Pomeroy & Justice Nix
 - Dissent: Justice Eagen
 - Chief Justice Jones did not participate in the consideration or the decision of this case.

G. Art. I, § 11 [Remedies]

- *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 932 (Pa. 2004) (holding unconstitutional under article I, section 11 (the “Remedies Clause”) a statute that limited successor asbestos-related liabilities of corporations that had merged or consolidated because it took away appellants’ right to remedy).
 - Majority: Chief Justice Cappy, joined by Justice Castille, Justice Nigro & Justice Baer
 - Dissent: Justice Newman, joined by Justice Eakin
 - Dissent: Justice Saylor, joined by Justice Eakin
- *Jenkins v. Hosp. of Med. Coll. of Pa.*, 634 A.2d 1099, 1100 (Pa. 1993) (holding that retroactive application of statute that eliminated a cause of action for wrongful birth would violate due process and equal protection guarantees of state and federal constitutions).

- Majority: Justice Zappala, joined by Justice Flaherty & Justice Cappy
- Concurring in the result: Chief Justice Nix & Justice Papadakos
- Justice Montemuro did not participate in the consideration or decision of this case.
- *Masloff v. Port Auth. of Allegheny Cty.*, 613 A.2d 1186, 1190 (1992) (holding that collective bargaining provision of the Port Authority Act violated right to remedy under article I, section 11 to the extent that it restricted the ability to “seek redress for a legal injury in an entity [the PAT] other than the one who sustains the injury”).
 - Majority: Justice Zappala, joined by Justice Flaherty, Justice McDermott, Justice Papadakos & Justice Cappy
 - Dissent: Chief Justice Nix
 - Dissent: Justice Larsen, joined in Parts I, II, and III by Chief Justice Nix
 - Former Justice McDermott did not participate in the decision of this case.
- *Boettger v. Loverro*, 555 A.2d 1234, 1239–40 (Pa. 1989) (construing Wiretapping and Surveillance Control Act to avoid conflict with reputation protections of article I, section 11 and holding newspaper liable for publishing information gleaned from a mistakenly disclosed wiretapped conversation otherwise entitled to privacy protections under the Act: “but for the enactment of the Act both the collection and dissemination of electronically obtained conversations would be clearly and *absolutely* prohibited. From this we reason that *only* when the protected information is disseminated either through an order of court unsealing it or through its use as evidence in an open court proceeding does the media’s interest rise above those of the Commonwealth and its citizens”), *vacated*, 493 U.S. 885 (1989).
 - Majority: Justice Zappala, joined by Justice Flaherty & Justice Papadakos
 - Dissent: Chief Justice Nix
 - Justice Larsen and Justice McDermott did not participate in the consideration or the decision of this case.
- *Boyle v. O’Bannon*, 458 A.2d 183, 185 (Pa. 1983) (determining that the Commonwealth Court erred by dismissing plaintiff’s complaint one day after it was filed and before the complaint was served on the defendant, conflicting with due process inherent in article I, section 11).

2018]

STILL LIVING

405

- Majority: Justice Larsen, joined by Justice Flaherty
- Concurring in the result: Justice Zappala & Chief Justice Roberts
- Dissent: Justice Nix, joined by Justice McDermott
- Dissent: Justice McDermott
- Dissent: Justice Hutchinson
- *Commonwealth v. Contakos*, 453 A.2d 578, 582 (Pa. 1982) (“This right of the public to attend criminal trials and of the accused to be assured of the freedom of the public to attend these trials and to monitor what goes on there has been abridged in this case. The trial court failed to preserve the appellant’s constitutional right to an impartial public trial.”).
 - Majority: Justice Flaherty, joined by Justice Roberts & Chief Justice O’Brien
 - Concurrence: Justice Roberts, joined by Chief Justice O’Brien
 - Dissent: Justice Nix, joined by Justice Hutchinson
 - Dissent: Justice McDermott
- *Commonwealth v. Hayes*, 414 A.2d 318, 327 (Pa. 1980) (granting newspaper’s motion to reverse decision to close suppression hearing to the public in light of article I, section 11 because “closure may not be ordered where some other available procedural device can fully protect the defendant’s right” to a fair trial).
 - Majority: Justice Nix, joined by Justice Larsen, Justice Flaherty & Justice Kauffman
 - Concurrence: Justice Larsen
 - Concurrence: Justice Flaherty
 - Concurrence: Justice Kauffman
 - Dissent: Justice Roberts, joined by Chief Justice Eagen & Justice O’Brien
- *Bershefsky v. Commonwealth*, 418 A.2d 1331, 1332 (Pa. 1980) (following the Court’s decision in *Gibson v. Commonwealth*, 415 A.2d 80 (Pa. 1980), to hold that Act 152—creating statutory sovereign immunity in certain cases—could not be constitutionally applied to actions, such as the one at issue, “which accrued and were in existence prior to passage of the Act”).
 - Majority: Justice Roberts, joined by Justice Larsen, Justice Flaherty & Justice Kauffman
 - Concurrence: Justice Larsen
 - Dissent: Justice Nix
 - Dissent: Chief Justice Eagen, joined by Justice O’Brien

- *Gibson v. Commonwealth*, 415 A.2d 80, 82–83 (Pa. 1980) (holding that Act 152 (sovereign immunity) did not apply to plaintiff's actions alleging the Commonwealth negligently supervised a dam that caused a flood, because otherwise plaintiff would be without a remedy in violation of article I, section 11).
 - Majority: Justice Roberts, joined by Justice Larsen & Justice Flaherty
 - Concurrence: Justice Larsen, joined by Justice Flaherty
 - Dissent: Chief Justice Eagen, Justice O'Brien & Justice Nix

H. Art. I, § 13 [Cruel Punishment]

- *Commonwealth v. 1997 Chevrolet & Contents Seized*, 160 A.3d 153, 192 (Pa. 2017) (remanding for gross disproportionality analysis under the Eighth Amendment and article I, section 13 of the Pennsylvania Constitution, in order to determine whether “the forfeited property was . . . grossly disproportionate to the gravity of the offense”).
 - Majority: Justice Todd, joined by Chief Justice Saylor, Justice Baer, Justice Donohue, Justice Dougherty & Justice Wecht
- *Commonwealth v. \$34,440.00*, 174 A.3d 1031, 1037 n.9, 1046 (Pa. 2017) (construing statute to allow rebuttal of presumption of drug relatedness without establishing “innocent owner” defense, and declining to address constitutional issues under “Excessive Fine Clauses” of the Eighth Amendment and article I, section 13).
 - Majority: Justice Baer joined by Justice Todd, Justice Donohue, Justice Dougherty & Justice Wecht
 - Dissent: Chief Justice Saylor, joined by Justice Mundy
 - Dissent: Justice Mundy
- *Commonwealth v. Batts*, 163 A.3d 410, 484 (Pa. 2017) (adopting a presumption against the imposition of a sentence of life without parole for a juvenile offender, and determining that defendant's sentence was unconstitutional).
 - Majority: Justice Donohue, joined by Chief Justice Saylor, Justice Todd, Justice Dougherty & Justice Wecht
 - Concurrence: Justice Wecht, joined by Justice Todd
 - Concurrence in part and dissent in part: Justice Baer
 - Justice Mundy did not participate in the consideration or decision of this case.
- *Shoul v. Commonwealth*, 173 A.3d 669, 687 (Pa. 2017) (finding no violation of article I, section 1 rights under *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003), but remanding for gross disproportionality analysis to consider whether life

2018]

STILL LIVING

407

- disqualification of commercial driver's licenses for convictions of certain drug crimes constituted cruel and unusual punishment).
- Majority: Justice Todd, joined by Chief Justice Saylor; Justice Donohue; Justice Wecht as to Parts I, II(B), and III; Justice Dougherty as to Parts I and II(B); & Justice Mundy as to Parts I and II(A)
 - Concurrence: Justice Wecht
 - Concurrence in part and dissent in part: Justice Dougherty, joined by Justice Baer
 - Concurrence in part and dissent in part: Justice Mundy
 - *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1270 (Pa. 2014) (holding that mandatory minimum fine of \$75,000 for misdemeanor theft of \$200 under Gaming Act violated Excessive Fines Clause of article I, section 13).
 - Majority: Chief Justice Castille, joined by Justice Saylor, Justice Eakin, Justice Baer, Justice Todd & Justice McCaffery
 - Former Justice Orié Melvin did not participate in the consideration or decision of this case.
 - *Commonwealth v. Boczkowski*, 846 A.2d 75, 80 (Pa. 2004) (vacating death sentence based on the fact that aggravating circumstance of prior murder committed in another state was based on an arbitrary factor due to prosecutor's violation of a court order).
 - Majority: Justice Castille, joined by Justice Cappy, Justice Newman, Justice Saylor & Justice Nigro
 - Concurrence: Justice Saylor, joined by Justice Nigro
 - Concurring in part and dissenting in part: Justice Eakin
 - Chief Justice Zappala did not participate in the decision of this case.
 - *Commonwealth v. Jasper*, 737 A.2d 196, 196–97 (Pa. 1999) (holding that absence of jury instruction telling jury they were not required to impose death penalty when they found one mitigating circumstance violated article I, section 13).
 - Majority: Chief Justice Flaherty, joined by Justice Zappala, Justice Cappy & Justice Nigro
 - Concurrence: Justice Zappala
 - Dissent: Justice Castille, joined by Justice Newman
 - *Commonwealth v. Baker*, 511 A.2d 777, 790 (Pa. 1986) (“We conclude that the inherent bias and prejudice to Appellant engendered by the Assistant District Attorney’s remarks necessitates reversal of the death sentence in the instant case,

and that under the circumstances said remarks also violated Appellant's rights under the Eighth Amendment . . . as well as violating Appellant's rights under Article I, § 13 . . .").

- Majority: Justice Papadakos, joined by Chief Justice Nix, Justice Larsen, Justice Flaherty, Justice McDermott, Justice Hutchinson & Justice Zappala
- Commonwealth v. Story, 440 A.2d 488, 489–90 (Pa. 1981) (citation omitted) (vacating defendant's death penalty sentence for a homicide allegedly committed in 1974: "Because the previous law governing this case has been declared unconstitutional insofar as it authorizes the death penalty, the sole permissible maximum punishment for appellant's crime committed in 1974 is life imprisonment.").
- Majority: Justice Roberts, joined by Chief Justice O'Brien, Justice Nix & Justice Wilkinson
- Concurrence: Justice Nix
- Dissent: Justice Larsen, joined by Justice Flaherty & Justice Kauffman

I. Art. I, § 17 [*Ex Post Facto*]

- Commonwealth v. Muniz, 164 A.3d 1189, 1223 (Pa. 2017) (performing an *Edmunds* analysis to find that the state constitution's ex post facto clause affords greater protections than its federal counterpart, and that SORNA's registration provisions constituted punishment violating both federal and state ex post facto clauses).
- Majority: Justice Dougherty, joined by Justice Baer & Justice Donohue; Justice Todd & Justice Wecht join except as to Parts V and VI.
- Concurrence: Justice Wecht, joined by Justice Todd
- Dissent: Chief Justice Saylor
- Justice Munday did not participate in the consideration or decision of this case.
- Commonwealth v. Reed, 168 A.3d 132 (Pa. 2017) (mem.) (per curiam order reversing decision of the Superior Court in light of *Commonwealth v. Muniz*, which found that SORNA violated the Ex Post Facto Clauses of the U.S. and Pennsylvania Constitutions).
- Per curiam
- Concurrence: Justice Mundy
- Concurrence: Chief Justice Saylor

2018]

STILL LIVING

409

- *Spann v. Pa. Bd. of Prob. & Parole*, 169 A.3d 1084 (Pa. 2017) (mem.) (per curiam order reversing decision of the Superior Court in light of *Commonwealth v. Muniz*, which found that SORNA violated the Ex Post Facto Clauses of the U.S. and Pennsylvania Constitutions).
 - Per curiam
 - Concurrence: Justice Mundy
 - Concurrence: Chief Justice Saylor
- *Commonwealth v. Rose*, 127 A.3d 794, 796, 807 (Pa. 2015) (determining that defendant must be sentenced under statute in effect at the time of the assault, in accordance with ex post facto clauses of both federal and state constitutions).
 - Majority: Justice Todd, joined by Chief Justice Saylor, Justice Eakin & Justice Baer
 - Concurrence: Chief Justice Saylor
 - Concurrence: Justice Eakin
 - Dissent: Justice Stevens

J. Art. I, § 17 [Impairment of Contracts]

- *Paronese v. Midland Nat'l Ins. Co.*, 706 A.2d 814, 815–16, 819 (Pa. 1998), (refusing to apply statute making designation of spouse as beneficiary ineffective after divorce because “if applied to this case, [it] would be unconstitutional, in violation of the contract clause.”).
 - Majority: Chief Justice Flaherty, joined by Justice Zappala, Justice Cappy, Justice Castille, Justice Nigro & Justice Newman
- *First Nat'l Bank of Pa. v. Flanagan*, 528 A.2d 134, 135, 137–38 (Pa. 1987) (“The parties frame the issue before us as whether the legislature can retroactively impose disclosure requirements on a loan transaction without violating the clauses of the United States and Pennsylvania Constitutions prohibiting impairment of the obligations of contracts. U.S. CONST. art. I, § 10; PA. CONST. art. I, § 17.1 As so framed, we must hold on this record that retroactive application of the amendment restoring disclosure requirements to this interim transaction is unconstitutional.”).
 - Majority: Justice Hutchinson, joined by Chief Justice Nix, Justice Larsen, Justice Flaherty, Justice McDermott, Justice Zappala & Justice Papadakos
- *City of Allentown v. Local 302, International Association of Fire Fighters*, 512 A.2d 1175, 1181–82 (Pa. 1986) (holding that “the City’s unilateral decision to close enrollment in the Pension Fund

and require new members of the bargaining unit to enroll in the Retirement System, with different obligations and benefits, constituted a breach of the collective bargaining agreement between the Union and the City,” and that “a unilateral change in retirement benefits to non-vested members cannot pass constitutional muster under Article I, § 17, of the State Constitution, prohibiting the impairment of contracts”).

- Majority: Justice Zappala, joined by Chief Justice Nix, Justice Larsen, Justice Flaherty, Justice McDermott & Justice Hutchinson
- Concurring: Justice Larsen
- Justice Papadakos did not participate in the consideration or decision of this case.
- *Ass’n of Pa. State Coll. & Univ. Faculties v. State Sys. of Higher Educ.*, 479 A.2d 962, 963, 965 (Pa. 1984) (affirming order declaring unconstitutional and permanently enjoining the enforcement of an amendment to the State Employees’ Retirement Code, requiring each member to contribute an additional 1.25% of wages to the system’s retirement fund as “a unilateral modification in the System adverse to its members [that] is void as applied to employees whose contractual rights were vested prior to its enactment”).
 - Majority: Chief Justice Nix, joined by Justice Larsen, Justice Flaherty, Justice McDermott, Justice Zappala & Justice Papadakos
 - Concurring in part and dissenting in part: Justice Hutchinson
- *Pa. Fed’n of Teachers v. Sch. Dist. of Phila.*, 484 A.2d 751, 753 (Pa. 1984) (holding that “the increased contribution rate prescribed in section 2 of Act 31 cannot constitutionally be imposed on employees who were members of PSERS prior to the effective date of the Act” pursuant to article I, section 17).
 - Majority: Chief Justice Nix, joined by Justice Larsen, Justice Flaherty, Justice McDermott, Justice Hutchinson, Justice Zappala & Justice Papadakos
 - Concurrence: Justice Hutchinson
- *Bellomini v. State Emps.’ Ret. Bd.*, 445 A.2d 737, 741 (Pa. 1982) (holding that denial of former state employees’ retirement benefits due to retroactive application of Act 140 was unconstitutional).
 - Majority: Chief Justice O’Brien, joined by Justice Nix, Justice McDermott & Justice Flaherty

2018]

STILL LIVING

411

- Concurrence: Justice Nix, joined by Justice McDermott
- Dissent: Justice Roberts, joined by Justice Larsen
- Justice Hutchinson did not participate in the consideration and decision of this case.
- *McKenna v. State Emps.’ Ret. Bd.*, 433 A.2d 871, 871–72 (Pa. 1981) (holding that class of all active state court judges with ten or more years of service as of June 22, 1972 had their retirement benefits impermissibly impaired under article I, section 17 by provisions of the revised State Employees’ Retirement Code).
 - Majority: Justice Roberts, joined by Justice Nix, Justice Flaherty, Justice Larsen & Justice Kauffman
 - Concurrence: Justice Nix
 - Concurrence: Justice Flaherty
 - Concurrence: Justice Larsen, joined by Justice Flaherty & Justice Kauffman

K. Art. 1, § 27 [Environmental]

- *Pa. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 916, 938–39 (Pa. 2017) (“Because state parks and forests, including the oil and gas minerals therein, are part of the corpus of Pennsylvania’s environmental public trust, we hold that the Commonwealth, as trustee, must manage them according to the plain language of Section 27, which imposes fiduciary duties consistent with Pennsylvania trust law,” and thus, statutes allocating oil and gas royalties to general fund are facially unconstitutional).
 - Majority: Justice Donohue, joined by Justice Todd, Justice Dougherty & Justice Wecht
 - Concurrence in part and dissent in part: Justice Baer, *id.* at 940–41 (concur in holdings of enforceability that “solidify the jurisprudential sea-change begun by Chief Justice Castille’s plurality in *Robinson Township v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 950–51 (2013);” dissents from application of “inflexible private trust requirements”)
 - Dissent: Chief Justice Saylor; joins “central analysis” of Justice Baer’s opinion
- *Robinson Township v. Commonwealth (Robinson II)*, 83 A.3d 901, 930–82 (Pa. 2013) (invalidated provisions of Act 13 regulating oil and gas extraction under environmental rights amendment: provision preempting municipalities’ obligation to plan for environmental concerns for oil and gas operations; statutory requirement that municipal zoning ordinances be

amended to include oil and gas operations in all zoning districts; statutory well location restrictions that allowed Department of Environmental Protection (DEP) to grant waiver from setback requirements; and provision that precluded municipalities from seeking appellate review of DEP's decisions on restriction waivers).

- Plurality: Chief Justice Castille, joined by Justice Todd & Justice McCaffery; Justice Baer joins as to Parts I, II, IV, V, VI(A), (B), (D)–(G)
- Concurrence: Justice Baer
- Dissent: Justice Saylor, Justice Eakin
- Dissent: Justice Eakin
- Justice Orié Melvin did not participate in the consideration or decision of this matter.
- *Robinson Township v. Commonwealth*, 147 A.3d 536, 542 (Pa. 2016) (holding enforcement provisions of Act 13 were not severable from invalidated portions, and declining to reconsider *Robinson II* because issue was not properly before the court).
 - Majority: Justice Todd, joined by Justice Donohue, Justice Dougherty & Justice Wecht
 - Concurrence in part and dissent in part: Chief Justice Saylor (dissents from severability)
 - Concurrence in part and dissent in part: Justice Baer (joins severability)
 - Justice Eakin did not participate in the consideration or decision of this case.
- *Commonwealth v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1209 (Pa. 1979) (construing Air Pollution Control Act pursuant to article I, section 27, and holding that the legislature had the power to enact policy to protect air resources to the degree necessary for the protection of the health, safety, and wellbeing of citizens).
 - Majority: Chief Justice Eagen, joined by Justice Roberts, Justice Nix, Justice Manderino & Justice Larsen
 - Justice Pomeroy did not participate in the consideration or decision of this case.
 - Justice O'Brien did not participate in the decision of this case.

L. *Art. I, § 28 [Equal Rights Amendment]*

- *Phila. Hous. Auth. v. Am. Fed'n of State Emps., Local 934*, 52 A.3d 1117, 1123, 1128 (Pa. 2012) (relying in part on Equal Rights Amendment, article I, section 28 as “a clear declaration of public

policy against sex discrimination,” holding that “the arbitrator’s award of reinstatement with back pay” in a case involving egregious sexual harassment “violates the public policy of this Commonwealth”).

- Majority: Chief Justice Castille joined by Justice Saylor, Justice Eakin & Justice Todd
 - Concurrence: Justice Saylor
 - Concurrence: Justice Eakin
 - Concurrence in part: Justice McCaffery & Justice Baer
 - Justice Orié Melvin did not participate in the decision of this case.
- Hartford Accident & Indem. Co. v. Ins. Comm’r of Pa., 482 A.2d 542, 543 (Pa. 1984) (reading provision of Casualty and Surety Rate Regulation Act with term “unfairly discriminatory” in light of the equal rights amendment).
 - Majority: Chief Justice Nix, joined by Justice Flaherty & Justice Hutchinson
 - Concurrence: Justice Flaherty, joined by Justice Hutchinson
 - Concurrence: Justice Hutchinson, joined by Justice Flaherty
 - Dissent: Justice McDermott, joined by Justice Zappala
 - Dissent: Justice Zappala, joined by Justice McDermott
 - Commonwealth *ex rel.* Stein v. Stein, 406 A.2d 1381, 1387 (Pa. 1979) (reading statute “to provide for reciprocity of remedy by spouses seeking to effectuate support orders” to avoid equal rights amendment conflict).
 - Majority: Justice Nix, Justice Roberts & Justice Larsen
 - Concurrence: Justice Roberts, joined by Justice Larsen
 - Concurring in the result: Justice O’Brien
 - Concurring in the result: Justice Manderino
 - Dissent: Chief Justice Eagen
 - George v. George, 409 A.2d 1, 1–2 (Pa. 1979) (construing statute allowing wives to obtain divorce from bed and board to avoid constitutional conflict with ERA: “We believe the proper disposition of this case is to apply the statute in question in such a way as to read it as providing for reciprocity of remedies for spouses.”).
 - Majority: Justice Flaherty, joined by Chief Justice Eagen, Justice O’Brien, Justice Nix & Justice Larsen
 - Concurring in the result: Justice Roberts
 - Justice Manderino did not participate in the decision of this case.

- Commonwealth *ex rel.* Spriggs v. Carson, 368 A.2d 635, 639–40 (Pa. 1977) (affirming trial court’s grant of custody to father and rejecting “tender years doctrine,” which created a presumption against the male parent, in light of the equal rights amendment).
 - Majority: Justice Nix, joined by Justice O’Brien & Justice Roberts
 - Concurring in the result: Chief Justice Jones, Justice Eagen & Justice Pomeroy
 - Justice Manderino did not participate in the consideration or decision of this case.
- Adoption of Walker, 360 A.2d 603, 605 (Pa. 1976) (holding that a statute providing that only mother is required to consent to adoption in the case of an illegitimate child creates an impermissible “distinction between unwed mothers and unwed fathers” that is “patently invalid” under the equal rights amendment of the Pennsylvania Constitution).
 - Majority: Justice Roberts, joined by Justice Eagen, Justice O’Brien & Justice Manderino
 - Concurring in the result: Justice Pomeroy & Justice Nix
 - Chief Justice Jones did not participate in the consideration or decision of this matter.
- Commonwealth v. Santiago, 340 A.2d 440, 445 (Pa. 1975) (rejecting female defendant’s defense of “coverture”—that she was coerced by her husband—in light of “present day considerations,” including *Conway v. Dana*, 318 A.2d 324 (Pa. 1974), and the equal rights amendment).
 - Majority: Justice Nix, joined by Chief Justice Jones, Justice Eagen, Justice O’Brien & Justice Pomeroy
 - Concurrence: Justice Roberts, joined by Justice Manderino
- DiFlorido v. DiFlorido, 331 A.2d 174, 179 (Pa. 1975) (classifying certain household goods and furniture acquired during the marriage and used by both spouses to be marital property, even though primarily bought with husband’s savings—rejecting earlier presumptions regarding household property ownership).
 - Majority: Chief Justice Jones, joined by Justice Eagen, Justice O’Brien, Justice Roberts, Justice Pomeroy, Justice Nix & Justice Manderino
- Butler v. Butler, 347 A.2d 477, 481 (Pa. 1975) (holding that wife was not entitled to constructive trust on the basis that she provided most of the money for their home while her husband contributed his salary to the marital unit and his labor in building the home).

2018]

STILL LIVING

415

- Majority: Chief Justice Jones, joined by Justice Eagen, Justice O'Brien, Justice Pomeroy & Justice Nix
- Concurrence: Justice Pomeroy, *id.* at 482 (“[D]ifference in treatment of transfers of property as between spouses violates the Equality of Rights Amendment”)
- Dissent: Justice Roberts
- Dissent: Justice Manderino
- *Kushik v. Kushik*, 328 A.2d 505, 506–07 (Pa. 1974) (remanding matter regarding enforcement order requiring husband to pay alimony in light of *Conway v. Dana*).
 - Majority: Justice Manderino, joined by Chief Justice Jones, Justice Eagen, Justice O'Brien, Justice Pomeroy & Justice Nix
 - Justice Roberts did not participate in the consideration or decision of this case.
- *Conway v. Dana*, 318 A.2d 324, 326 (Pa. 1974) (“We hold that insofar as these decisions suggest a presumption that the father, solely because of his sex and without regard to the actual circumstances of the parties, must accept the principal burden of financial support of minor children, they may no longer be followed[,]” pursuant to the Equal Rights Amendment).
 - Majority: Justice Nix, joined by Justice Eagen, Justice O'Brien, Justice Roberts, Justice Pomeroy & Justice Manderino
 - Dissent: Chief Justice Jones
- *Commonwealth v. Butler*, 328 A.2d 851, 852, 855 (Pa. 1974) (holding “unconstitutional that portion of the new Muncy Act directing that no minimum sentence be imposed on women convicted of crime” because it violates the Equal Rights Amendment).
 - Majority: Justice Roberts, joined by Chief Justice Jones, Justice O'Brien, Justice Pomeroy, Justice Nix & Justice Manderino
 - Concurrence: Justice Pomeroy
 - Concurring in the result: Justice Eagen
- *Henderson v. Henderson*, 327 A.2d 60, 62 (Pa. 1974) (*per curiam*) (determining that former statutory provision, which permitted the payment of alimony *pendente lite*, counsel fees, and expenses to the wife in a divorce action but not to the husband, was invalid as violative of the Equal Rights Amendment).
 - *Per curiam*

- *Hopkins v. Blanco*, 320 A.2d 139, 140 (Pa. 1974) (“[I]f the husband may recover for loss of consortium, to deny the wife an equal right would be invalid under the Pennsylvania Constitution. To draw such a distinction would have no rational or proper foundation at law, and would clearly be a form of invalid discrimination based strictly on sex.”).
 - Majority: Justice Eagen, joined by Justice O’Brien, Justice Roberts, Justice Pomeroy, Justice Nix & Justice Manderino
 - Concurring in the result: Chief Justice Jones

M. Art. III, § 14 [Education]

- *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 417, 463–64 (Pa. 2017) (finding justiciable claims that the system of public education funding violated the state constitution’s education and equal protection clauses: PA. CONST. art. III, §§ 14, 32).
 - Majority: Justice Wecht, joined by Justice Todd, Justice Donohue, Justice Dougherty & Justice Mundy
 - Concurrence: Justice Dougherty
 - Dissent: Chief Justice Saylor
 - Dissent: Justice Baer

N. Art. III, § 32 [Equal Treatment]

- *Robinson Township v. Commonwealth*, 147 A.3d 536, 572, 576, 582 (Pa. 2016) (*Robinson III*) (holding that provision restricting health care professionals’ access to and ability to disseminate information regarding chemicals used in fracking process constituted “legislative favoritism of particular industries” in violation of section 32 and that exclusion of private well owners from mandatory spill notification provided to public water systems was unconstitutional because it furthered no legitimate legislative goal).
 - (Notice provisions struck entirely, with effect stayed for 180 days).
 - Majority: Justice Todd, joined by Justice Donohue, Justice Dougherty, and Justice Wecht
 - Concurrence in part and dissent in part: Chief Justice Saylor (dissents from notification holding)
 - Concurrence in part and dissent in part: Justice Baer (dissents from notification holding)

2018]

STILL LIVING

417

- Justice Eakin did not participate in the consideration or decision of the case.
- *W. Mifflin Area Sch. Dist. v. Zahorchak*, 4 A.3d 1042, 1048–49 (Pa. 2010) (holding that statutes concerning closure of high school programs by third class school districts created a class of one member that is closed or substantially closed to future membership, which is “special legislation” that is per se unconstitutional in violation of article III, section 32).
 - Majority: Justice Saylor, joined by Chief Justice Castille, Justice Eakin, Justice Baer, Justice Todd, Justice McCaffery & Justice Orié Melvin
- *Pa. Tpk. Comm’n v. Commonwealth*, 899 A.2d 1085, 1086–87, 1096 (Pa. 2006) (holding that the First-Level Supervisor Collective Bargaining Act violated the constitutional prohibition against special laws, because “there 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”).
 - Majority: Justice Castille, joined by Chief Justice Cappy, Justice Newman, Justice Saylor, Justice Eakin, Justice Baer & Justice Baldwin
- *Harrisburg Sch. Dist. v. Hickok*, 761 A.2d 1132, 1136 (Pa. 2000) (amendment to Education Empowerment Act that exempted school district in state capital from treatment mandated for other school district was unconstitutional special legislation because it created a class of one member).
 - Majority: Chief Justice Flaherty, joined by Justice Zappala, Justice Cappy & Justice Castille
 - Concurring in result: Justice Nigro
 - Concurrence and Dissent: Justice Saylor
- *DeFazio v. Civil Serv. Comm’n*, 756 A.2d 1103, 1106 (Pa. 2000) (statutes requiring sheriffs of second class counties to abide by certain hiring and promotion procedures violated equal protection provision under article III, section 32).
 - Majority: Chief Justice Flaherty, joined by Justice Cappy, Justice Castille, Justice Nigro, Justice Newman & Justice Saylor
 - Concurrence in the result: Justice Zappala
- *Hoffman v. Township of Whitehall*, 677 A.2d 1200, 1203 (Pa. 1996) (statutory preference in Veterans’ Preference Act accorded to veterans seeking promotion in public employment was

- unconstitutional, a holding grounded in due process and equal protection).
- Majority: Justice Flaherty, Chief Justice Nix & Justice Cappy
 - Dissent: Justice Zappala, joined by Justice Castille
 - Dissent: Justice Castille
- *Curtis v. Kline*, 666 A.2d 265, 270 (Pa. 1995) (invalidating statute on the basis that there is “no rational reason why those similarly situated with respect to needing funds for college education, should be treated unequally”).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty & Justice Castille
 - Dissent: Justice Montemuro, joined by Justice Cappy
 - *Ridley Arms, Inc. v. Ridley Township*, 531 A.2d 414, 416–18 (Pa. 1987) (construing First Class Township Code in light of article III, section 32 to determine that solid waste removal ordinance violates the Code by imposing unreasonable fees and charges, and avoids constitutional analysis).
 - Majority: Justice Flaherty, joined by Chief Justice Nix, Justice Hutchinson & Justice Papadakos
 - Concurrence: Justice Nix
 - Dissent: Justice Zappala
 - *Commonwealth v. Bonadio*, 415 A.2d 47, 51–52 (Pa. 1980) (“Not only does the [Voluntary Deviate Sexual Intercourse Statute] exceed the proper bounds of the police power, but, in addition, it offends the Constitution by creating a classification based on marital status (making deviate acts criminal only when performed between unmarried persons) where such differential treatment is not supported by a sufficient state interest and thereby denies equal protection of the laws.”).
 - Majority: Justice Flaherty, joined by Chief Justice Eagen, Justice Larsen & Justice Kauffman
 - Concurrence: Chief Justice Eagen, joined by Justice Larsen & Justice Kauffman
 - Concurrence: Justice Larsen
 - Dissent: Justice Roberts, joined by Justice O’Brien
 - Dissent: Justice Nix
 - *Kroger Co. v. O’Hara Township*, 392 A.2d 266, 267, 276 (Pa. 1978) (holding Sunday Trading Laws, which prescribe criminal sanctions for all labor, business, and commercial activities on Sunday, violated equal protection).
 - Majority: Justice Manderino, joined by Justice O’Brien, Justice Roberts, Justice Nix & Justice Larsen

- Concurrence: Justice Nix
- Concurrence: Justice Larsen
- Dissent: Chief Justice Eagen, joined by Justice Pomeroy
- Moyer v. Phillips, 341 A.2d 441, 443–45 (Pa. 1975) (slander and libel exception within statutes, providing that all causes of action or proceedings except actions for slander or libel shall survive the death of plaintiff or defendant, constituted an arbitrary denial of equal protection).
 - Majority: Chief Justice Jones, joined by Justice Roberts, Justice Nix, Justice Manderino, Justice Eagen & Justice O'Brien
 - Concurrence: Justice Roberts, joined by Justice Nix
 - Concurrence: Justice Manderino
 - Justice Pomeroy did not participate in the consideration or decision of this case.
- Goodman v. Kennedy, 329 A.2d 224, 231 (Pa. 1974) (holding that family status classification in the Sunday Trading Law violated the Equal Protection Clause of the Fourteenth Amendment and article III, section 32 of the Pennsylvania Constitution, noting that “[e]conomic discrimination, in and of itself, is not a legitimate legislative objective which justifies the closing of some stores on Sunday and not others”).
 - Judgment: Justice Manderino, joined by Justice Eagen, Justice Pomeroy (Parts I, III, and IV), Justice Nix (Parts I, III, and IV), Chief Justice Jones (Parts II–IV) & Justice Roberts (Parts II–IV)
 - Concurrence: Justice Roberts, joined by Chief Justice Jones
 - Concurring in part and dissenting in part: Justice Nix, joined by Justice Pomeroy
 - Dissent: Justice O'Brien
- *In re Estate of Cavill*, 329 A.2d 503, 504, 506 (Pa. 1974) (statute generally invalidating bequest in wills to religious and charitable organizations made within thirty days of testator’s death denies charitable beneficiaries equal protection of the laws).
 - Majority: Justice Roberts, joined by Chief Justice Jones, Justice O'Brien, Justice Nix and Justice Manderino
 - Dissent: Justice Pomeroy, joined by Justice Eagen, *id.* at 506 (“[T]he majority comes perilously close to assuming the posture of a super-legislature which judges the wisdom rather than the validity of legislation.”)
- State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa., 272 A.2d 478, 479–80 (Pa. 1971) (holding unconstitutional under

article III, section 32 of the Pennsylvania Constitution a provision of the Chiropractic Registration Act because the exemptions afforded a specific organization for certain standards of educational and professional competence were not grounded in “sound reason and real necessity”).

- Majority: Justice Roberts, joined by Justice O’Brien
- Concurring in the result: Chief Justice Bell & Justice Eagen
- Concurring in part and dissenting in part: Justice Pomeroy, joined by Justice Jones
- Justice Cohen did not participate in the decision of this case.

O. Art. VIII, § 1 [Tax Uniformity]

- *Nextel Commc’ns Mid-Atl., Inc. v. Commonwealth*, 171 A.3d 682, 685 (Pa. 2017) (finding net-loss-carryover provision in the Pennsylvania revenue code, which restricted the amount of loss a corporation could carry over from prior years as a deduction, violated the uniformity clause).
 - Majority: Justice Todd, joined by Chief Justice Saylor, Justice Donohue, Justice Dougherty, Justice Wecht & Justice Mundy
 - Concurrence: Justice Baer joined by Justice Donohue & Justice Wecht
- *Valley Forge Towers Apartments v. Upper Merion Area Sch. Dist.*, 163 A.3d 962, 965, 980 (Pa. 2017) (holding that the uniformity clause did not permit a school district to appeal selectively only assessment commercial properties, such as apartment complexes, while choosing not to appeal assessments of other types of property, such as single-family residential homes).
 - Majority: Chief Justice Saylor, joined by Justice Baer, Justice Todd, Justice Donohue, Justice Dougherty, Justice Wecht & Justice Mundy
- *Mount Airy #1, LLC v. Pa. Dep’t of Revenue*, 154 A.3d 268, 271, 273, 280 (Pa. 2016) (finding the municipal portion of the local share assessment levied on gross slot machine revenue under the Race Horse Development and Gaming Act imposing flat levy above cut-off income violated the uniformity clause of the state constitution—which the court referred to as the “provision in our constitution [that] has been so much litigated yet so little understood”).
 - Majority: Justice Wecht, joined by Justice Baer, Justice Donohue & Justice Dougherty
 - Concurrence in part and dissent in part: Chief Justice Saylor
 - Concurrence in part and dissent in part: Justice Todd

2018]

STILL LIVING

421

- *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty. Bd. of Assessment Appeals*, 44 A.3d 3, 9 (Pa. 2012) (affirming conclusion that property owner was not an institution of a “purely public charity” entitled to exemption from real estate taxes within the meaning of article VIII, section 2(a)(v) of the Pennsylvania Constitution).
 - Majority: Justice Eakin, joined by Justice Baer, Justice Todd & Justice McCaffery
 - Dissent: Justice Saylor, joined by Chief Justice Castille & Justice Orié Melvin
- *Clifton v. Allegheny County.*, 969 A.2d 1197, 1229 (Pa. 2009) (ordinance providing for continued, indefinite use of a base year method of valuation for property tax purposes violated the uniformity clause as applied in Allegheny County—but not facially—because it resulted in a form of classification that was unreasonable and not rationally related to any legitimate state purpose).
 - Majority: Chief Justice Castille, joined by Justice Saylor, Justice Eakin, Justice Todd, Justice McCaffery & Justice Greenspan
 - Concurrence: Justice Baer
- *Downingtown Area Sch. Dist. v. Chester Cty. Bd. of Assessment Appeals*, 913 A.2d 194, 205 (Pa. 2006) (finding statutory tax scheme 72 P.S. § 5349(d.2), which precluded uniformity challenge if common level ratio was within 15% of the established predetermined ratio, violated the uniformity clause of the Pennsylvania Constitution).
 - Majority: Justice Saylor, joined by Justice Castille, Justice Newman, Justice Baer & Justice Baldwin
 - Dissent: Chief Justice Cappy, joined by Justice Eakin
- *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1248 (Pa. 2004) (legislative provisions exempting transfers of real estate between “life partners” from the real estate transfer tax violated the uniformity clause).
 - Majority: Justice Nigro, joined by Chief Justice Cappy, Justice Castille, Justice Saylor, Justice Eakin & Justice Baer
 - Justice Newman did not participate in the consideration or decision of this matter.
- *Cmty. Options, Inc. v. Bd. of Prop. Assessment*, 813 A.2d 680, 687 (Pa. 2002) (determining that non-profit providing housing and employment services for individuals with intellectual disabilities was considered a “purely public charity” under article VIII, section 2 and qualified for tax-exempt status).

- Majority: Chief Justice Zappala, joined by Justice Cappy, Justice Castille, Justice Nigro & Justice Newman
- Concurrence: Justice Nigro
- Dissent: Justice Saylor, joined by Justice Eakin
- *City of Harrisburg v. Sch. Dist. of Harrisburg*, 710 A.2d 49, 54 (Pa. 1998) (Resolution 276 violates the uniformity clause because it distinguishes between lessees of public and nonpublic property, without a reasonable and just basis for the difference in treatment).
 - Majority: Justice Newman, joined by Chief Justice Flaherty and Justice Zappala, Justice Cappy, Justice Castille & Justice Nigro
- *PICPA Found. for Educ. & Research v. Commonwealth Bd. of Fin. & Revenue*, 634 A.2d 187, 190–91 (Pa. 1993) (construing section 204(10) of the Tax Code—in light of constitutional requirement that only institutions that are “purely public charities” be exempted from taxes—to deny non-profit corporation’s sales tax refund).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty, Justice Papadokos, Justice Cappy & Justice Montemuro
 - Concurring: Chief Justice Nix, joined by Justice Cappy & Justice Montemuro
- *Auto. Trade Ass’n of Greater Phila. v. City of Philadelphia*, 596 A.2d 794, 797 (Pa. 1991) (“As argument before this Court focused on the retroactivity question, we are unprepared, on this meager record, to decide [whether the Mercantile License Tax violated the uniformity clause]. We must, therefore, remand the matter to the Court of Common Pleas for decision on the claim that the Mercantile License Tax was unconstitutional, and for determination of the appropriate remedy, if any.”).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty, Justice McDermott, Justice Papadokos, Justice Cappy & Justice Larsen
 - Concurrence: Justice Papadokos, joined by Justice Larsen
- *Hosp. Utilization Project v. Commonwealth*, 487 A.2d 1306, 1312, 1318 (Pa. 1985) (determining that plaintiff organization was not entitled to sales and use tax exemptions because it was not a “purely public charity” within the meaning of the state constitution, and construing section 204(10) in light of constitutional limitation “to exempt only those charitable organizations which are institutions of ‘purely public charity’”).

2018]

STILL LIVING

423

- Majority: Chief Justice Nix, joined by Justice Larsen, Justice Flaherty, Justice McDermott, Justice Hutchinson, Justice Zappala & Justice Papadakos
- *Gilbert Assocs., Inc. v. Commonwealth*, 447 A.2d 944, 945, 947 (Pa. 1982) (holding that difference in treatment of domestic and foreign corporations in calculating franchise tax by the Board of Finance and Revenue, solely based on their place of incorporation, was constitutionally impermissible).
 - Majority: Justice Roberts (Opinion of the Court)
- *Ritz v. Commonwealth*, 432 A.2d 169, 171 (Pa. 1981) (determining that husband could exclude union dues from taxable income in light of tax uniformity clause).
 - Majority: Justice Flaherty, joined by Justice Larsen, Justice Wilkinson & Justice Kauffman
 - Concurring in part and dissenting in part: Justice Roberts, joined by Chief Justice O'Brien
 - Concurring in the result: Justice Nix
- *Commonwealth v. Molycorp, Inc.*, 392 A.2d 321, 321–22, 324 (Pa. 1978) (holding that where Tentative Tax Act provided two methods for computation of tentative tax, Commonwealth could not systematically discriminate against taxpayers, choosing second method by assessing additional tax against them for underpayment of tentative tax, while allowing taxpayers using other method to escape such additional tax).
 - Majority: Justice Roberts, joined by Chief Justice Eagen, Justice O'Brien, Justice Pomeroy, Justice Nix & Justice Manderino
 - Concurring in the result: Justice Larsen
- *Commonwealth v. Staley*, 381 A.2d 1280, 1282–83 (Pa. 1978) (construing phrase “payment to reimburse actual expenses” in section 301(d)(v) so as to avoid constitutional conflict with article VIII, section 1 of the Pennsylvania Constitution).
 - Majority: Justice Manderino, joined by Justice O'Brien & Justice Roberts
 - Concurrence: Justice Roberts, joined by Justice O'Brien
 - Concurring in the result: Justice Nix, Justice Roberts & Justice O'Brien
 - Dissent: Justice Pomeroy
 - Dissent: Chief Justice Eagen
- *Columbia Gas Transmission Corp. v. Commonwealth*, 360 A.2d 592, 597 (Pa. 1976) (treating a foreign corporation, once it is allowed entry, differently than domestic corporations in the

absence of any reasonable basis for separate treatment violated the tax uniformity clause).

- Majority: Justice Roberts, joined by Chief Justice Jones, Justice Eagen, Justice O'Brien, Justice Pomeroy & Justice Manderino
- Concurring in the result: Justice Nix
- ITE Imperial Corp. v. Commonwealth, 365 A.2d 139, 139 (Pa. 1976) (per curiam) (Department of Revenue order sustaining an excise tax on foreign corporations could not be enforced as it violated the tax uniformity clause).
 - Per curiam
- Amidon v. Kane, 279 A.2d 53, 60–61 (Pa. 1971) (statute purporting to impose flat 3.5% tax but excluding from taxable income all interest received on obligations of the Commonwealth and its political subdivisions violated the tax uniformity clause).
 - Majority: Justice Roberts, joined by Chief Justice Bell, Justice O'Brien & Justice Barbieri
 - Concurrence: Chief Justice Bell
 - Concurring in part: Justice Pomeroy
 - Dissent: Justice Eagen, joined by Justice Jones

III. CRIMINAL PROCESS

A. Art. I, § 8 [Search and Seizure]

- Commonwealth v. Shabazz, 166 A.3d 278, 286–87 (Pa. 2017) (held that the passenger had automatic standing to challenge the illegal search of his vehicle under article I, section 8).
 - Majority: Justice Wecht, joined by Chief Justice Saylor, Justice Todd, Justice Donohue & Justice Dougherty
 - Concurrence: Justice Mundy, joined by Justice Baer
- Commonwealth v. Loughnane, 173 A.3d 733, 745–46 (Pa. 2017) (rejecting automobile exception in defendant's vehicle search, and remanding to determine whether probable cause and exigent circumstances existed to justify search under article I, section 8).
 - Majority: Justice Donohue, joined by Justice Baer, Justice Todd, Justice Dougherty & Justice Wecht
 - Concurrence: Justice Mundy
 - Concurring in part and dissenting in part: Chief Justice Saylor
- Commonwealth v. Myers, 164 A.3d 1162, 1172, 1180–82 (Pa. 2017) (determining that the implied consent statute did not authorize warrantless blood test of unconscious defendant; the blood test

2018]

STILL LIVING

425

- violated defendant's article I, section 8 and Fourth Amendment rights).
- Majority: Justice Wecht, joined by Justice Donohue, Justice Dougherty & Justice Todd in Parts I, II(A), II(B), II(D), and mandate
 - Concurrence: Chief Justice Saylor, joined by Justice Baer in full & Justice Donohue in Part II
 - Concurrence: Justice Todd
 - Dissent: Justice Mundy
 - *Commonwealth v. Arter*, 151 A.3d 149, 155–56, 167 (Pa. 2016) (conducting an *Edmunds* analysis and determining that the exclusionary rule, derived from article I, section 8 of the state constitution, applies to parole and probation revocation proceedings, unlike the federal exclusionary rule).
 - Majority: Justice Todd, joined by Justice Baer, Justice Donohue, Justice Dougherty & Justice Wecht
 - Dissent: Chief Justice Saylor
 - *Commonwealth v. Enimpah*, 106 A.3d 695, 702–03 (Pa. 2014) (reasoning that the defendant had the right to compel prosecution to prove its evidence was not obtained in violation of defendant's state constitutional rights under article I, section 8).
 - Majority: Justice Eakin, joined by Chief Justice Castille, Justice Baer, Justice Todd & Justice Stevens
 - Concurrence: Justice Saylor, joined by Chief Justice Castille in footnote 2, *id.* at 705 n.2 (“I would also note that there is a good argument to be made that a threshold focus, before assessing hearing burdens, should be on the sufficiency of the suppression motion in the first instance.”)
 - Former Justice McCaffery did not participate in the decision of this case.
 - *Commonwealth v. Dunnavant*, 107 A.3d 29, 32 (Pa. 2014) (*per curiam*) (affirming by an equally divided court the superior court's order to suppress videotape made in defendant's home by a confidential informant, invoking the strong privacy interest individuals possess in the home).
 - Opinion in support of affirmance: Justice Saylor, joined by Justice Baer & Justice Todd
 - Opinion in support of affirmance: Justice Todd, joined by Justice Baer
 - Opinion in support of reversal: Chief Justice Castille, joined by Justice Eakin & Justice Stevens
 - Opinion in support of reversal: Justice Stevens

- Justice McCaffery did not participate in the decision of this case.
- Commonwealth v. Johnson, 86 A.3d 182, 187, 191 (Pa. 2014) (following *Edmunds* and holding that good faith exception to exclusionary rule enshrined in article I, section 8 would not be adopted for purpose of admitting physical evidence seized incident to arrest based solely on an expired arrest warrant).
 - Majority: Chief Justice Castille, joined by Justice Saylor, Justice Eakin, Justice Baer & Justice Todd
 - Dissent: Justice McCaffery, joined by Justice Stevens
- Commonwealth v. Wilson, 67 A.3d 736, 745 (Pa. 2013) (holding that the Pennsylvania Uniform Firearms Act did not empower sentencing court to direct probation officer to conduct warrantless, suspicionless searches of a probationer as a condition of probation, in light of the statutory construction of section 9912(d)(2)).
 - Majority: Chief Justice Castille, joined by Justice Saylor, Justice Eakin, Justice Baer & Justice Todd
 - Dissent: Justice McCaffery
 - Former Justice Orié Melvin did not participate in the decision of this case.
- Commonwealth v. Lagenella, 83 A.3d 94, 99 n.3, 105–06 (Pa. 2013) (holding that officer could not conduct warrantless search of immobilized and safely parked vehicle, and finding “the Fourth Amendment and Article I, Section 8 to be coextensive”).
 - Majority: Justice Todd, joined by Chief Justice Castille, Justice Baer & Justice McCaffery
 - Concurrence: Justice Saylor
 - Dissent: Justice Eakin
 - Former Justice Orié Melvin did not participate in the consideration or decision of this case.
- Commonwealth v. Marconi, 64 A.3d 1036, 1037, 1044 (Pa. 2013) (affirming grant of motion to suppress evidence obtained when defendant’s car was stopped at a roadside sobriety checkpoint because sheriffs and their deputies lacked authority independently to establish and conduct suspicionless roadside sobriety checkpoint).
 - Majority: Justice Saylor, joined by Chief Justice Castille, Justice Baer & Justice Todd
 - Concurrence: Justice Eakin
 - Dissent: Justice McCaffery

2018]

STILL LIVING

427

- Justice Orié Melvin did not participate in the decision of this case.
- Commonwealth v. Wallace, 42 A.3d 1040, 1048, 1052 (Pa. 2012) (confirming adoption of *Gates* totality-of-the-circumstances test with respect to article I, section 8, the court held that the anticipatory search of defendant’s home violated his constitutional rights and granted motion to suppress seized evidence).
 - Majority: Justice Todd, joined by Justice Saylor, Justice Baer & Justice Orié Melvin
 - Dissent: Justice Eakin, joined by Chief Justice Castille
 - Dissent: Justice McCaffery, joined by Chief Justice Castille
- Commonwealth v. Antoszyk, 38 A.3d 816, 817 (Pa. 2012) (per curiam) (affirming by “an equally divided vote, the Superior Court’s holding that a search warrant is invalid if the affidavit of probable cause included a confidential informant’s deliberate misstatement”).
 - In support of affirmance: Justice Saylor, Justice Baer & Justice Todd (no opinion)
 - Opinion in support of reversal: Justice Eakin, joined by Chief Justice Castille & Justice McCaffery
 - Justice Orié Melvin did not participate in the consideration or decision of this case.
- Commonwealth v. Grahame, 7 A.3d 810, 811, 816–17 (Pa. 2010) (finding that the police officer lacked reasonable suspicion to conduct warrantless search of defendant’s handbag for safety reasons based solely on the fact that defendant was in a residence where another individual had sold illegal drugs about ten minutes earlier outside of defendant’s presence in violation of article I, section 8 of the Pennsylvania Constitution and the Fourth Amendment).
 - Majority: Justice Orié Melvin, joined by Chief Justice Castille, Justice Saylor & Justice Baer
 - Concurrence: Justice Eakin, joined by Justice McCaffery
 - Concurrence: Justice Todd
- Commonwealth v. Mistler, 912 A.2d 1265, 1272–73 (Pa. 2006) (finding suspicionless stop of defendants to determine if they had engaged in underage drinking, in the absence of paramount public interest, violated the Fourth Amendment and article 1, section 8 of the Pennsylvania Constitution).
 - Majority: Justice Newman joined by Chief Justice Cappy & Justice Baer

- Concurrence: Justice Baldwin
- Dissent: Justice Castille, joined by Justice Saylor
- Dissent: Justice Eakin, joined by Justice Castille
- Commonwealth v. Laventure, 894 A.2d 109, 118, 119 (Pa. 2006) (arrest warrant failed to describe unknown defendant “as nearly as may be” requirement in article I, section 8, which “requires more specificity than the federal particularity requirement,” and was thus ineffective for tolling section 5552(b)’s period of limitations).
 - Majority: Justice Saylor, joined by Chief Justice Cappy, Justice Castille, Justice Newman & Justice Baer
 - Former Justice Nigro and Justice Eakin did not participate in the consideration or decision of this case.
- Commonwealth v. Cruz, 851 A.2d 870, 872, 875, 878 (Pa. 2004) (finding defendant entitled to post-conviction relief on the same grounds for which co-defendant was granted for his article I, section 8 claim because certain evidence obtained should have been suppressed).
 - Majority: Justice Saylor, joined by Chief Justice Cappy, Justice Nigro, Justice Newman & Justice Baer
 - Dissent: Justice Castille
 - Justice Eakin did not participate in the decision of this case.
- Commonwealth v. Shaw, 770 A.2d 295, 299 (Pa. 2001) (hospital release of blood test results was unconstitutional when done at the request of a police trooper without a search warrant).
 - Majority: Justice Zappala
 - Concurrence: Justice Nigro, *id.* at 300 (citing to *Edmunds*, argues that the majority opinion “does damage to the settled methodology this Court has used to analyze state constitutional provisions in comparison to their federal counterparts to determine whether the former provide additional protections which the latter do not”)
 - Dissent: Justice Castille, joined by Justice Saylor, *id.* at 301 (“[A] warrantless police request [like the one at issue] is just as reasonable, and hence as constitutionally permissible, under Article I, § 8 as it is under the Fourth Amendment.”)
- Commonwealth v. Torres, 764 A.2d 532, 540 (Pa. 2001) (affirming grant of motion to suppress evidence collected because affidavit of probable cause did not provide substantial basis upon which to issue a warrant).
 - Majority: Justice Nigro, joined by Chief Justice Flaherty, Justice Zappala, Justice Cappy & Justice Saylor

2018]

STILL LIVING

429

- Concurrence and Dissent: Justice Castille & Justice Newman
- Commonwealth v. Freeman, 757 A.2d 903, 909 (Pa. 2000) (finding law enforcement officer's seizure of driver and subsequent search of her car by obtaining her consent was the product of an illegal detention).
 - Majority: Justice Saylor, joined by Chief Justice Flaherty, Justice Zappala, Justice Cappy, Justice Castille & Justice Newman
 - Concurring in the result: Justice Nigro
- Commonwealth v. Polo, 759 A.2d 372, 376 (Pa. 2000) (stopping of a commercial passenger bus and detaining passengers was an unconstitutional seizure in violation of article I, section 8).
 - Majority: Justice Zappala, joined by Chief Justice Flaherty, Justice Cappy & Justice Nigro
 - Concurrence and dissent: Justice Saylor, joined by Justice Castille
 - Dissent: Justice Newman
- Commonwealth v. Wimbush, 750 A.2d 807, 809, 810 n.2 (Pa. 2000) (held that police officer's investigatory stop violated defendant's article I, section 8 and Fourth Amendment rights, noting in footnote 2 that "Pennsylvania has consistently followed Fourth Amendment jurisprudence in stop and frisk cases").
 - Majority: Justice Nigro, joined by Chief Justice Flaherty, Justice Cappy & Justice Saylor
 - Concurrence: Chief Justice Flaherty
 - Dissent: Justice Zappala
 - Dissent: Justice Castille, joined by Justice Newman
- Commonwealth v. Goodwin, 750 A.2d 795, 797 n.3 (Pa. 2000) (companion case to *Wimbush*, noting in footnote 3 that Pennsylvania follows Fourth Amendment jurisprudence in stop and frisk cases).
 - Majority: Justice Nigro
 - Concurrence: Justice Zappala, joined by Chief Justice Flaherty
 - Dissent: Justice Castille, joined by Justice Newman
- Commonwealth v. Gindlesperger, 743 A.2d 898, 906 (Pa. 1999) (holding that warrantless use of infrared thermal imaging device to scan private residence for heat from suspected marijuana growing operation was unconstitutional search under the Fourth Amendment and article I, section 8 of the Pennsylvania Constitution).

- Majority: Justice Zappala, joined by Chief Justice Flaherty, Justice Cappy, Justice Newman, Justice Saylor & Justice Nigro
- Concurring: Justice Nigro
- Dissent: Justice Castille
- *In re D.M.*, 743 A.2d 422, 425 (Pa. 1999) (held that police officer did not have cause pursuant to state and federal constitutions to stop juvenile based on an anonymous tip, citing *Cook* that an officer must have “specific and articulable facts and reasonable inferences drawn from those facts in light of the officer’s experience”), *vacated sub nom.* *Pennsylvania v. D.M.*, 529 U.S. 1126 (2000).
 - Majority: Justice Cappy, joined by Chief Justice Flaherty, Justice Zappala & Justice Nigro
 - Dissent: Justice Castille, joined by Justice Newman
 - Dissent: Justice Saylor
- *Commonwealth v. Clark*, 735 A.2d 1248, 1253 (Pa. 1999) (officer did not have probable cause to justify warrantless arrest, and evidence seized during search incident to arrest must be suppressed).
 - Majority: Justice Nigro, joined by Chief Justice Flaherty, Justice Zappala & Justice Cappy
 - Dissent: Justice Castille, joined by Justice Newman
- *Commonwealth v. Ardestani*, 736 A.2d 552, 556 (Pa. 1999) (applying *Brion*, the court determined that police illegally recorded defendants’ conversations with informants in their respective homes).
 - Majority: Justice Zappala, joined by Chief Justice Flaherty, Justice Cappy & Justice Nigro
 - Concurrence: Justice Nigro
 - Dissent: Justice Castille, joined by Justice Newman
 - Justice Saylor did not participate in the consideration or decision of this case.
- *Commonwealth v. Wilson*, 707 A.2d 1114, 1118 (Pa. 1998) (holding that “when the prior inconsistent statement is a contemporaneous verbatim recording of a witness’s statement, the recording of the statement must be an electronic, audiotaped or videotaped recording in order to be considered as substantive evidence”).
 - Majority: Justice Zappala, joined by Chief Justice Flaherty, Justice Cappy, Justice Castille & Justice Nigro
 - Dissent: Justice Newman

2018]

STILL LIVING

431

- Commonwealth v. Graham, 721 A.2d 1075, 1082 (Pa. 1998) (police search of defendant’s back pockets and seizure of drugs was beyond what was necessary to determine whether the suspect was armed).
 - Majority: Justice Nigro, joined by Chief Justice Flaherty
 - Concurring in the result: Justice Zappala, Justice Cappy, Justice Castille & Justice Newman
- Commonwealth v. Graziano-Constantino, 718 A.2d 746, 748 (Pa. 1998) (police officer did not have probable cause to stop defendant’s truck pursuant to search warrant issued for the premises).
 - Majority: Chief Justice Flaherty, joined by Justice Cappy, Justice Nigro & Justice Saylor
 - Concurring in result: Justice Zappala
 - Dissent: Justice Newman, joined by Justice Castille
- In Interest of S.J., 713 A.2d 45, 48 (Pa. 1998) (pat-down search of juvenile pursuant to investigatory stop arising from observation of group of males smoking marijuana on street corner was unjustified).
 - Majority: Justice Nigro, joined by Chief Justice Flaherty & Justice Zappala
 - Concurring in part and dissenting in part: Justice Cappy
 - Dissent: Justice Castille, joined by Justice Newman
- Commonwealth v. Jackson, 698 A.2d 571, 573, 576 (Pa. 1997) (*Terry* stop and pat-down without reasonable suspicion violated article I, section 8 rights, which are broader than those afforded under Federal Constitution).
 - Majority: Justice Cappy, joined by Chief Justice Flaherty, Justice Zappala & Justice Nigro
 - Dissent: Justice Newman, joined by Justice Castille
- Commonwealth v. Hawkins, 692 A.2d 1068, 1071 (Pa. 1997) (applying the rule set forth in *Queen* and holding that police radio broadcast describing a man carrying a gun, and based on an anonymous tip, did not justify the search of that person and seizure of his weapon).
 - Majority: Chief Justice Flaherty, joined by Justice Zappala & Justice Cappy
 - Concurring in the result: Justice Nigro
 - Dissent: Justice Newman, joined by Justice Castille
- Commonwealth v. Selby, 688 A.2d 698, 699 (Pa. 1997) (holding that wiretap recording in individual’s home and recording his conversations violated his article I, section 8 rights—“an

- individual's right to privacy in his home should remain inviolate").
- Majority: Chief Justice Flaherty, joined by Justice Zappala, Justice Cappy & Justice Nigro
 - Concurring in the result: Justice Nigro
 - Dissent: Justice Castille
 - Dissent: Justice Newman, joined by Justice Castille
 - Commonwealth v. Crompton, 682 A.2d 286, 290 (Pa. 1996) (violating the knock-and-announce rule warrants suppression of evidence as a remedy to an article I, section 8 violation).
 - Majority: Justice Newman, joined by Justice Flaherty, Justice Zappala, Justice Cappy & Justice Nigro
 - Dissent: Justice Castille
 - Chief Justice Nix did not participate in the decision of this case.
 - Commonwealth v. White, 669 A.2d 896, 902 (Pa. 1995) (warrantless search of vehicle did not fall into any exception to justify a search under article I, section 8 of the Pennsylvania Constitution).
 - Majority: Justice Flaherty, joined by Justice Nix, Justice Cappy, Justice Papadakos & Justice Zappala
 - Concurrence: Justice Montemuro
 - Dissent: Justice Castille
 - Justice Papadakos did not participate in the decision of this case.
 - Commonwealth v. Brion, 652 A.2d 287, 287 (Pa. 1994) ("Article I, § 8 of the Pennsylvania Constitution precludes the police from sending a confidential informer into the home of an individual to electronically record his conversations and transmit them back to the police.").
 - Majority: Justice Zappala, joined by Justice Flaherty, Justice Cappy & Justice Montemuro
 - Dissent: Chief Justice Nix, joined by Justice Papadakos & Justice Castille
 - Commonwealth v. Queen, 639 A.2d 443, 445–46 (Pa. 1994) (declaring the rule that "a stop and frisk may be supported by a police radio bulletin *only* if evidence is offered at the suppression hearing establishing the articulable facts which support the reasonable suspicion," and holding that, after applying said rule, the suppression court violated both the Fourth Amendment and article I, section 8 of the Pennsylvania Constitution).

2018]

STILL LIVING

433

- Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty, Justice Papadakos, Justice Cappy & Justice Montemuro
- Justice Larsen did not participate in the consideration or decision of this case.
- Commonwealth v. Lewis, 636 A.2d 619, 624–25 (Pa. 1994) (use of “drug courier profile” as a law enforcement technique violated the Fourth Amendment and article I, section 8 of the Pennsylvania Constitution).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty & Justice Cappy
 - Dissent: Justice Papadakos
 - Dissent: Justice Montemuro, joined by Justice Papadakos
 - Justice Larsen did not participate in the decision of this case.
- Commonwealth v. Schaeffer, 688 A.2d 1143, 1144 (Pa. 1993) (per curiam) (affirming by an equally divided court that the Pennsylvania Constitution “precludes the police from sending a confidential informer into the home of an individual to electronically record his conversations and transmit them back to the police”).
 - Opinion in support of affirmance: Justice Zappala, joined by Justice Flaherty & Justice Cappy
 - Opinion in support of reversal: Chief Justice Nix, joined by Justice Larsen & Justice Papadakos
 - Opinion in support of reversal: Justice Larsen
 - Opinion in support of reversal: Justice Papadakos
 - Justice Montemuro did not participate in the consideration or decision of this matter.
- Commonwealth v. Mason, 637 A.2d 251, 256–57 (Pa. 1993) (knocking down apartment door with battering ram before warrant was issued, and absent exigent circumstances, violated article I, section 8, following *Edmunds* analysis).
 - Majority: Justice Flaherty, joined by Justice Cappy, Justice Zappala & Chief Justice Nix
 - Concurrence: Justice Cappy
 - Concurring in the result: Justice Montemuro
 - Dissent: Justice Papadakos
 - Justice Larsen did not participate in the decision of this case.
- Commonwealth v. Means, 614 A.2d 220, 221–22 (Pa. 1992) (forcibly entering home after waiting five to ten seconds following announcement violated article I, section 8 knock-and-announce rule).

- Majority: Chief Justice Nix, joined by Justice Flaherty, Justice McDermott, Justice Zappala & Justice Cappy
- Concurring in the result: Justice Larsen
- Dissent: Justice Papadakos
- *Commonwealth v. Rodriguez*, 614 A.2d 1378, 1384 (Pa. 1992) (detaining an individual near a drug raid without reasonable suspicion violated defendant's article I, section 8 rights under the Pennsylvania Constitution).
 - Majority: Justice Cappy, joined by Chief Justice Nix, Justice Flaherty & Justice Zappala
 - Dissent: Justice Papadakos
 - Justice Larsen did not participate in the consideration or decision of this case.
 - Justice McDermott did not participate in the decision of this case.
- *Commonwealth v. Kohl*, 615 A.2d 308, 315 (Pa. 1992) (chemical tests on suspected drunk drivers, authorized by statute, violated article I, section 8 of the Pennsylvania Constitution).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty & Justice Cappy
 - Dissent: Justice Larsen, joined by Justice Papadakos
 - Dissent: Justice Papadakos
 - Justice McDermott did not participate in the decision of the case.
- *Commonwealth v. Chambers*, 598 A.2d 539, 542 (Pa. 1991) (police officers' failure to wait for any period of time before forcibly entering premises to execute search warrant violated the knock-and-announce rule under article I, section 8 of the Pennsylvania Constitution).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty & Justice Cappy
 - Concurring in the result: Justice Larsen
 - Dissent: Justice McDermott, joined by Justice Papadakos
- *Commonwealth v. Edmunds*, 586 A.2d 887, 894, 905–06 (Pa. 1991) (establishing new “methodology” to analyze future state constitutional issues, then analyzing article I, section 8 to determine there is no “good faith” exception to the exclusionary rule).
 - Majority: Justice Cappy, joined by Chief Justice Nix, Justice Larsen, Justice Flaherty, Justice Zappala & Justice Papadakos
 - Concurrence: Justice Papadakos

2018]

STILL LIVING

435

- Dissent: Justice McDermott
- *Commonwealth v. Hashem*, 584 A.2d 1378, 1382 (Pa. 1991) (construing Pennsylvania’s Wiretap Act to meet the standard of reasonableness, that “at a minimum, *all* the requirements directed by the Legislature be met,” and finding that the Commonwealth’s failure to obtain permission to disclose communications in prosecution of a crime different from targeted crime, prior to the disclosure, irreversibly tainted defendant’s conviction).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Larsen, Justice Flaherty & Justice Papadakos
 - Dissent: Justice McDermott
 - Former Justice Stout did not participate in the decision of this case.
- *Commonwealth v. Bricker*, 581 A.2d 147, 150–51, 153, 155 (Pa. 1990) (holding that the failure to give corrupt source charge regarding prosecution witness was reversible error where evidence permitted inference that witness was accomplice—even though trial court gave “false in one false in all” charge and defense counsel effectively cross-examined witness, and made closing argument alerting jury to scrutinize witness’s testimony carefully—and sending unredacted plea agreements of prosecution witnesses to jury was reversible error).
 - Majority: Justice Cappy, joined by Justice Larsen, Justice Zappala & Justice Papadakos
 - Dissent: Justice Flaherty, joined by Chief Justice Nix & Justice McDermott
- *Commonwealth v. Grossman*, 555 A.2d 896, 900 (Pa. 1989) (holding that search warrant authorizing seizure of “all files” was unconstitutionally overbroad).
 - Majority: Justice Stout, joined by Chief Justice Nix, Justice Larsen & Justice Flaherty
 - Dissent: Justice McDermott, joined by Justice Papadakos
 - Justice Zappala did not participate in the consideration or decision of this case.
- *Commonwealth v. Melilli*, 555 A.2d 1254, 1256, 1262–63 (Pa. 1989) (holding that pen register, used to investigate alleged organized illegal gambling operation of defendant, could not be used by law enforcement authorities without order based on probable cause; and evidence obtained from pen registers was not within good-faith exception to exclusionary rule).

- Majority: Justice Papadakos, joined by Justice Larsen, Justice Zappala & Justice Stout
- Concurring in the result: Chief Justice Nix & Justice Flaherty
- Dissent: Justice McDermott
- Commonwealth v. Ionata, 544 A.2d 917, 920–22 (Pa. 1988) (affirming by an equally divided court that the Commonwealth failed to establish that exigent circumstances were present to validate warrantless search of defendant’s automobile).
 - Opinion in support of affirmance: Justice Flaherty, joined by Chief Justice Nix & Justice Zappala
 - Dissent: McDermott, joined by Justice Larsen
 - Dissent: Papadakos, joined by Justice Larsen
- Commonwealth v. McFarren, 525 A.2d 1185, 1188 (Pa. 1987) (statute permitting police to request second blood alcohol test to substantiate accuracy of first test was unreasonable and in violation of the Pennsylvania Constitution).
 - Majority: Justice Zappala, joined by Justice Nix & Justice Flaherty
 - Concurring in the result: Justice McDermott
 - Concurring in the result: Justice Papadakos
 - Noting a Dissent: Justice Larsen & Justice Hutchinson
- Commonwealth v. Sell, 470 A.2d 457, 468–69, 459 (Pa. 1983) (upholding “automatic standing” principle as a matter of state constitutional law and the Commonwealth’s greater recognition of a right of privacy, and quoting the Supreme Court Justice in William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977)).
 - Majority: Justice Nix, joined by Chief Justice Roberts, Justice Larsen, Justice Flaherty & Justice Zappala
 - Dissent: Justice McDermott
 - Dissent: Justice Hutchinson
- Commonwealth v. Long, 414 A.2d 113, 117 (Pa. 1980) (“[W]e conclude that the search of the locked automobile trunk was unreasonable, in violation of Art. I, s[ection] 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution, and the evidence seized must be suppressed.”).
 - Majority: Justice Roberts, joined by Chief Justice Eagen, Justice O’Brien, Justice Nix & Justice Manderino
 - Dissent: Justice Flaherty, joined by Justice Larsen & Justice Kauffman

2018]

STILL LIVING

437

- Commonwealth v. DeJohn, 403 A.2d 1283, 1291–92 (Pa. 1979) (reversing defendant’s third-degree murder conviction on the ground that she had a legitimate expectation of privacy in bank record, consisting of cancelled check, and admission of the check was prejudicial error).
 - Majority: Justice O’Brien, joined by Chief Justice Eagen, Justice Roberts & Justice Nix
 - Concurrence: Justice Roberts
 - Concurring in part and dissenting in part: Justice Larsen
 - Dissent: Justice Manderino
 - Justice Manderino filed a dissenting statement on denial of reargument.
- Commonwealth v. Wagner, 406 A.2d 1026, 1031 (Pa. 1979) (warrantless arrest of defendant was illegal because even though police had probable cause to arrest on a theft charge, it was not a crime of violence, and entry into fiancée’s premises was forcible).
 - Majority: Justice Flaherty, joined by Chief Justice Eagen, Justice O’Brien, Justice Roberts & Justice Manderino
 - Concurrence: Justice Eagen
 - Concurrence: Justice Roberts
 - Concurrence: Justice Nix
 - Dissent: Justice Larsen
- Commonwealth v. Walker, 383 A.2d 1253, 1254 (Pa. 1978) (“The suppression court denied relief . . . even though it found that appellant was a juvenile and was denied the right to consultation. It did so, however, on April 24, 1974, prior to our decisions holding that all juveniles are entitled to consultation before they can effectively waive their constitutional rights. Under those cases, appellant . . . is entitled to relief. We agree therefore with appellant that all statements should have been suppressed.”).
 - Majority: Justice Manderino, joined by Justice Roberts
 - Concurring in the result: Justice O’Brien & Justice Nix
 - Dissent: Justice Pomeroy, joined by Chief Justice Eagen & Justice Larsen
- Commonwealth v. Knowles, 327 A.2d 19, 20, 23 (Pa. 1974) (holding that narcotics, recovered from dollar bill abandoned by defendant during search incident to his arrest, were fruit of the primary illegality and that such contraband and evidence obtained from subsequent search of defendant’s residence were inadmissible).
 - Majority: Justice Roberts, joined by Justice Pomeroy, Justice Eagen, Justice Nix & Justice Manderino
 - Concurrence: Justice Pomeroy, joined by Justice Eagen

- Concurring in the result: Chief Justice Jones
- Commonwealth v. Platou, 312 A.2d 29, 31–32, 34 (Pa. 1973) (determining that warrant authorizing search of friend’s apartment did not authorize search of defendant’s suitcases, which were found on the apartment floor, where defendant had not relinquished control over suitcases and police had been informed that suitcases did not belong to the friend), *overruled by* Commonwealth v. Reese, 549 A.2d 909 (Pa. 1988).
 - Majority: Justice Roberts, joined by Justice Eagen, Justice O’Brien, Justice Pomeroy, Justice Nix & Justice Manderino
 - Dissent: Chief Justice Jones

B. PA. Const. Art. I, § 9

1. Assistance of Counsel

- Commonwealth v. Rosado, 150 A.3d 425, 433 (Pa. 2016) (determining that a failure to file or perfect a direct appeal, guaranteed as of right in article V, section 9, is ineffective assistance of counsel per se because the error completely forecloses appellate review).
 - Majority: Justice Todd, joined by Justice Baer, Justice Donohue & Justice Dougherty
 - Concurrence: Justice Saylor, joined by Chief Justice Wecht & Justice Mundy
- Kuren v. Luzerne County, 146 A.3d 715, 732 n.6, 751 (Pa. 2016) (“We recognize for the first time in Pennsylvania a prospective cause of action enabling indigent criminal defendants to prove that the level of funding provided by a county to operate a public defender’s office has left that office incapable of complying with *Gideon*, creating the likelihood of a systematic, widespread constructive denial of counsel in contravention of the Sixth Amendment to the United States Constitution”—noting in footnote 6 that “[i]t is now well-settled that the right to counsel recognized in Article I, Section 9 and in the Sixth Amendment . . . are jurisprudentially coextensive”).
 - Majority: Justice Wecht, joined by Chief Justice Saylor, Justice Todd, Justice Donohue & Justice Dougherty
 - Concurrence: Justice Baer
- Commonwealth v. Tharp, 101 A.3d 736, 771 (Pa. 2014) (finding trial counsel’s investigation into mitigation evidence fell below the constitutional standard of effectiveness of counsel under *Strickland* performance prong).

2018]

STILL LIVING

439

- Majority: Justice Baer, joined by Justice McCaffery
- Concurrence: Chief Justice Castille, joined by Justice Eakin
- Concurrence: Justice Saylor, joined by Justice Todd & Justice Eakin
- Concurrence: Justice Eakin
- Concurrence in part and dissent in part: Justice Stevens
- Commonwealth v. Martin, 5 A.3d 177, 180, 204 (Pa. 2010) (holding that counsel provided ineffective assistance by failing to present mitigating evidence at penalty phase of capital murder trial).
 - Majority: Justice Baer, joined by Justice Todd
 - Concurrence: Chief Justice Castille, joined by Justice McCaffery
 - Concurrence in part and dissent in part: Justice Saylor
 - Concurrence in part and dissent in part: Justice Eakin
 - Orié Melvin did not participate in the consideration or decision of this case.
- Commonwealth v. Smith, 995 A.2d 1143, 1172–73 (Pa. 2010) (holding that defendant received ineffective assistance of counsel during penalty phase of murder prosecution).
 - Majority: Justice Eakin, joined by Chief Justice Castille, Justice Todd & Justice McCaffery
 - Concurrence: Justice Baer
 - Concurrence in part and dissent in part: Justice Saylor
- Commonwealth v. Sneed, 899 A.2d 1067, 1084 (Pa. 2006) (holding that trial counsel was ineffective for failing to adequately investigate and present mitigating evidence at sentencing).
 - Majority: Justice Castille, joined by Chief Justice Cappy, Justice Newman, Justice Saylor, Justice Eakin, Justice Baer & Justice Baldwin
- Commonwealth v. Collins, 888 A.2d 564, 584 (Pa. 2005) (finding counsel ineffective for failing to reasonably attempt to uncover mitigating evidence in the penalty phase. The court did not specifically rely on state constitution in reaching its conclusion).
 - Majority: Chief Justice Cappy, joined by Justice Nigro, Justice Newman & Justice Baer
 - Concurrence: Justice Saylor
 - Concurrence and Dissent: Justice Castille, joined by Justice Eakin
- Commonwealth v. Halley, 870 A.2d 795, 801 (Pa. 2005) (counsel’s “failure to file a Rule 1925(b) statement on behalf of criminal defendant seeking to appeal his conviction,” which resulted “in a

- waiver of all claims asserted on direct appeal,” was ineffective assistance).
- Majority: Justice Saylor, joined by Justice Cappy, Chief Justice Castille, Justice Nigro, Justice Newman, Justice Eakin & Justice Baer
 - Commonwealth v. Moore, 860 A.2d 88, 100–01 (Pa. 2004) (finding trial counsel was ineffective for failing to present any mitigating evidence at sentencing).
 - Majority: Justice Eakin, joined by Justice Cappy, Chief Justice Castille & Justice Newman
 - Concurrence and Dissent: Justice Saylor, joined by Justice Nigro & Justice Baer
 - Commonwealth v. Malloy, 856 A.2d 767, 789 (Pa. 2004) (counsel was ineffective during capital sentencing phase).
 - Majority: Justice Castille, joined by Chief Justice Cappy, Justice Nigro, Justice Newman, Justice Saylor, Justice Eakin & Justice Baer
 - Commonwealth v. Brooks, 839 A.2d 245, 250 (Pa. 2003) (held counsel was ineffective for failing to meet in person once with defendant before a capital trial).
 - Majority: Justice Nigro, joined by Chief Justice Cappy, Justice Newman, Justice Saylor, Justice Eakin & Justice Lamb
 - Concurrence: Justice Castille, *id.* at 250 (arguing that *Strickland/Pierce* test does not support “prophylactic” rule by Majority of requiring face-to-face meeting)
 - Concurrence: Justice Eakin
 - Concurrence: Justice Lamb
 - Commonwealth v. Johnson, 828 A.2d 1009, 1015 (Pa. 2003) (holding defendant’s right to counsel under the Sixth Amendment and article I, section 9 attached when trial court was giving jury instructions, and exclusion of defense counsel violated such rights).
 - Majority: Justice Eakin, joined by Justice Cappy, Justice Castille, Justice Nigro, Justice Newman & Justice Saylor
 - Chief Justice Zappala did not participate in the opinion.
 - Commonwealth v. Chambers, 807 A.2d 872, 883–84 (Pa. 2002) (held that counsel was ineffective for failure to object to jury instruction on death penalty mitigating circumstances).
 - Majority: Justice Newman, joined by Justice Zappala, Chief Justice Cappy, Justice Saylor & Justice Eakin
 - Concurrence in the result: Justice Castille & Justice Nigro

2018]

STILL LIVING

441

- Commonwealth v. Rucker, 761 A.2d 541, 543–44 (Pa. 2000) (defendant was entitled to change of counsel from court-appointed counsel).
 - Majority: Chief Justice Flaherty, joined by Justice Zappala, Justice Cappy, Justice Castille, Justice Nigro & Justice Saylor
 - Justice Newman did not participate in the consideration or decision of this case.
- Commonwealth v. McAleer, 748 A.2d 670, 676 (Pa. 2000) (defendant’s right to counsel was violated when his chosen attorney was unable to appear for trial, and the judge failed to grant his substitute counsel’s request for continuance).
 - Majority: Justice Nigro, joined by Justice Flaherty, Chief Justice Zappala, Justice Cappy, Justice Castille, Justice Newman & Justice Saylor
- Commonwealth v. Lantzy, 736 A.2d 564, 572–73 (Pa. 1999) (failure to inform defendant that “the sentencing court had no authority to impose [a] reduced sentence” in exchange for withdrawing his appeal constituted ineffective assistance and relief was available under the Post Conviction Relief Act).
 - Majority: Justice Saylor, joined by Chief Justice Flaherty, Justice Zappala, Justice Cappy, Justice Castille, Justice Nigro & Justice Newman
- Commonwealth *ex rel.* Buchanan v. Verbonitz, 581 A.2d 172, 175 (Pa. 1990) (holding that “the Pennsylvania Constitution mandates a criminal defendant’s right to confrontation and cross-examination at the preliminary hearing. In this case, Buchanan was denied the right to confront and cross-examine the witnesses against him”).
 - Majority: Justice Larsen, joined by, Justice Cappy, Justice Zappala & Justice Papadakos
 - Concurrence: Justice Flaherty, joined by Justice Cappy
 - Dissent: Chief Justice Nix, joined by Justice McDermott
 - Dissent: Justice McDermott
- Commonwealth v. Henderson, 437 A.2d 387, 388 (Pa. 1981) (maintaining Commonwealth’s interested-adult rule, premised on the court’s belief that “administering of Miranda warnings to a juvenile, without providing an opportunity to that juvenile to consult with a mature, informed individual concerned primarily with the interest of the juvenile, (is) inadequate to offset the disadvantage occasioned by his youth” (alteration in original) (quoting Commonwealth v. Smith, 372 A.2d 797, 800 (Pa. 1977))).

- Majority: Justice Roberts, joined by Chief Justice O'Brien, Justice Nix & Justice Wilkinson
- Dissent: Justice Larsen, joined by Justice Flaherty & Justice Kauffman
- Dissent: Justice Kauffman, joined by Justice Larsen & Justice Flaherty
- Commonwealth v. Newmiller, 409 A.2d 834, 839 (Pa. 1979) (holding that defendant was denied effective assistance of counsel by failing to object to counsel's arguments about applying the missing witness rule when defendant's wife wasn't called but was present at the time).
 - Majority: Justice O'Brien
 - Concurrence: Chief Justice Eagen
 - Concurring in part and dissenting in part: Justice Roberts
 - Concurring in part and dissenting in part: Justice Nix, joined by Justice Larsen
 - Concurring in part and dissenting in part: Justice Larsen
 - Justice Manderino did not participate in the decision of this case.
- Commonwealth v. Romberger, 347 A.2d 460, 463–64 (Pa. 1975) (holding that failure of police to advise indigent defendant of his right to free counsel before interrogating him violated his Fifth Amendment rights and article I, section 9 rights).
 - Majority: Justice Nix, joined by Chief Justice Jones, Justice O'Brien, Justice Roberts & Justice Manderino
 - Concurrence: Justice Roberts joined by Justice O'Brien & Justice Manderino
 - Concurring in the result: Justice Eagen & Justice Pomeroy
- *In re* Adoption of R.I., 312 A.2d 601, 603 (Pa. 1973) (indigent natural mother was entitled to be advised of her right to counsel and to appointment of counsel, and appointment of counsel after decree terminating rights was insufficient).
 - Majority: Justice O'Brien, joined by Chief Justice Jones, Justice Eagen, Justice Roberts, Justice Nix & Justice Manderino
 - Concurrence: Justice Pomeroy
 - Concurrence: Justice Nix, joined by Justice Manderino
- Commonwealth v. Sheehan, 285 A.2d 465, 471 (Pa. 1971) (holding that a person charged with a drunk driving offense is entitled to representation by counsel), *superseded by statute*, 42 PA. CONS. STAT. § 9542 (1997).

2018]

STILL LIVING

443

- Majority: Justice Pomeroy, joined by Justice Jones, Justice Eagen, Justice O'Brien, Justice Roberts & Justice Barbieri
- Dissent: Chief Justice Bell

2. Law of the Land

- Commonwealth v. Noel, 857 A.2d 1283, 1284, 1287–88 (Pa. 2004) (holding that vehicle code provision which treated horse riders like vehicle drivers except for those provisions “*which by their very nature can have no application*” was unconstitutionally vague (quoting 75 PA. CONS. STAT. § 3103(a) (1977), *held unconstitutional* by Commonwealth v. Noel, 857 A.2d 1283 (2004))).
 - Majority: Justice Nigro, joined by Chief Justice Cappy, Justice Castille & Justice Baer
 - Concurrence: Justice Saylor, joined by Justice Newman
 - Dissent: Justice Eakin
- Commonwealth v. Snyder, 713 A.2d 596, 597, 599–600, 606 (Pa. 1998) (finding article I, section 9’s phrase, “law of the land,” and Federal Due Process provides the same protection in this case, and defendant’s due process rights were violated for pre-arrest delay of more than eleven years).
 - Majority: Justice Newman, joined by Justice Castille, Justice Nigro & Justice Saylor
 - Concurring in part and dissenting in part: Justice Zappala, joined by Chief Justice Flaherty & Justice Cappy
- Commonwealth v. Barud, 681 A.2d 162, 166–67 (Pa. 1996) (Statute allowing a DUI conviction if driver’s blood alcohol content exceeded .10% within three hours after driving was unconstitutionally vague and overbroad).
 - Majority: Justice Castille, joined by Chief Justice Nix, Justice Flaherty, Justice Zappala & Justice Cappy
- Commonwealth v. Davis, 586 A.2d 914, 916, 917 (Pa. 1991) (affirming by an equally divided court the Pennsylvania Superior Court’s decision to suppress hearsay evidence that was gathered in violation of the “due process clause of our state constitution,” the article I, section 9 “law of the land” provision).
 - Opinion in support of affirmance: Justice Flaherty, joined by Justice Larsen & Justice Zappala
 - Concurrence: Justice Larsen
 - Dissent: Chief Justice Nix, joined by Justice McDermott & Justice Papadakos
 - Dissent: Justice McDermott

- Justice Cappy did not participate in the consideration or disposition of this case.
- *Commonwealth v. Lewis*, 598 A.2d 975, 982–83 (Pa. 1991) (holding that failure of the trial judge to include the “no-adverse-inference” charge in his jury instructions violated defendant’s rights pursuant to article I, section 9).
 - Majority: Justice Cappy, joined by Justice Flaherty, Justice Larsen, Justice Papadakos & Justice Nix
 - Concurrence: Chief Justice Nix, joined by Justice Papadakos & Justice Flaherty
 - Dissent: Justice McDermott
- *Commonwealth v. Slaybaugh*, 364 A.2d 687, 690 (Pa. 1976) (Section 1212 of the Motor Vehicle Code, which “mandates a finding that the owner of a motor vehicle was driving that vehicle at the time of a vehicle code violation, unless the owner-defendant takes the stand and submits to examination,” was an unconstitutional presumption in criminal cases under article I, section 9).
 - Majority: Justice O’Brien, joined by Chief Justice Jones, Justice Roberts, Justice Pomeroy, Justice Nix & Justice Manderino
 - Concurring in the result: Justice Eagen
- *Commonwealth v. Devlin*, 333 A.2d 888, 892 (Pa. 1975) (holding that proof that defendant committed the crime of which he was convicted on some date within a fourteen-month period was insufficient to fix the date of the crime with certainty required by due process).
 - Majority: Chief Justice Jones, joined by Justice Eagen, Justice O’Brien, Justice Roberts, Justice Nix & Justice Manderino
 - Justice Pomeroy did not participate in the consideration or decision in this case.
- *Commonwealth v. Young*, 317 A.2d 258, 260 (Pa. 1974) (“We hold that appellant was denied a fair trial, guaranteed by the due process clause of the fourteenth amendment to the United States Constitution and article I, section 9 of the Pennsylvania Constitution, because the trial court failed to instruct the jury with a full and adequate charge on reasonable doubt.”).
 - Majority: Justice Roberts, joined by Justice Eagen, Justice O’Brien, Justice Pomeroy, Justice Nix & Justice Manderino
 - Dissent: Chief Justice Jones

2018]

STILL LIVING

445

- *Moore v. Jamieson*, 306 A.2d 283, 284, 292 (Pa. 1973) (rule prohibiting an attorney to take any additional criminal defendant clients if he has ten or more criminal cases which are over a year old was defective as too vague and overbroad for lack of any standard as to assigning responsibility for the delay and for failure to provide any adequate standard or procedure).
 - Majority: Justice Nix, joined by Justice Eagen, Justice O'Brien & Justice Pomeroy
 - Concurring in the result: Chief Justice Jones & Justice Roberts
 - Concurrence: Justice Manderino
- 3. Additional Rights of the Accused
 - *Commonwealth v. Cooley*, 118 A.3d 370, 375 n.8, 379–80, (Pa. 2015) (holding that interrogation of defendant by parole agents violated his right against self-incrimination under the Fifth Amendment—and article I, section 9 affords no greater protection than the Federal Constitution).
 - Majority: Justice Eakin, joined by Justice Baer, Justice Todd & Justice Saylor
 - Dissent: Justice Stevens
 - Former Chief Justice Castille and former Justice McCaffery did not participate in the decision of this case.
 - *Commonwealth v. Molina*, 104 A.3d 430, 452 (Pa. 2014) (finding defendant's right against self-incrimination was violated by the use of his pre-arrest silence as substantive evidence of guilty: "After reviewing article I, section 9 of the Pennsylvania Constitution pursuant to *Edmunds*, we conclude that the factors weigh in favor of diverging from the currently asserted minimum standard of federal protection of the right against self-incrimination in regard to the use of pre-arrest silence as substantive evidence").
 - Majority: Justice Baer, joined by Justice Saylor & Justice Todd
 - Concurrence: Justice Saylor, joined by Justice Todd
 - Dissent: Justice Castille
 - Dissent: Justice Eakin
 - Justice Stevens did not participate in the consideration or decision of this case.
 - Former Justice McCaffery did not participate in the consideration of this case.

- Commonwealth v. Sloan, 907 A.2d 460, 468 (Pa. 2006) (construing Rule 600(E)'s mandatory remedy of nominal release after 180 days in light of article I, section 14, to hold that it is not the same as unconditional release—instead, “[r]elease may be conditioned on terms that not only give adequate assurance that the accused will appear for trial, but also assures that victims, witnesses, and the community will be protected”).
 - Majority: Justice Baer, joined by Chief Justice Cappy, Justice Castille, Justice Newman, Justice Saylor & Justice Eakin
 - Former Justice Nigro did not participate in the consideration or decision of this matter.
- Commonwealth v. Robins, 812 A.2d 514, 516, 526–27 (Pa. 2002) (holding that inculpatory statements made by a non-testifying coconspirator offended defendant's right of confrontation).
 - Majority: Justice Cappy, joined by Chief Justice Zappala & Justice Nigro
 - Concurring: Justice Saylor
 - Dissent: Justice Castille, joined by Justice Newman
 - Dissent: Justice Eakin, joined by Justice Castille & Justice Newman
- Commonwealth v. Chmiel, 738 A.2d 406, 409, 424 (Pa. 1999) (counsel's prior testimony from ineffectiveness hearing was inadmissible at second trial and violated defendant's right against compelled self-incrimination and right to effective assistance of counsel).
 - Majority: Justice Saylor, joined by Justice Flaherty, Chief Justice Zappala, Justice Cappy & Justice Nigro
 - Dissent: Justice Castille, joined by Justice Newman
- Commonwealth v. Franciscus, 710 A.2d 1112, 1121 (Pa. 1998) (admission of incriminating statements that defendant made to jailhouse informant violated right to counsel guaranteed by the Federal and Pennsylvania Constitutions—conducting two separate analyses).
 - Majority: Justice Zappala, joined by Chief Justice Flaherty, Justice Cappy & Justice Nigro
 - Dissent: Justice Castille, joined by Justice Newman
- Commonwealth v. Loudon, 638 A.2d 953, 957 (Pa. 1994) (interpreting statutes to limit the use of testimony videotaped in closed circuit television so as to comport with article I, section 9 right to “face to face” confrontation).

2018]

STILL LIVING

447

- Majority: Justice Papadakos, joined in Part A by Justice Zappala & Justice Cappy; joined in Part B by Chief Justice Nix & Justice Flaherty
- Concurring in part and dissenting in part: Justice Flaherty, joined by Justice Nix
- Concurring in part and dissenting in part: Justice Zappala, joined by Justice Cappy
- Justice Larsen and Justice McDermott did not participate in the decision of this case.
- *Commonwealth v. LaRosa*, 626 A.2d 103, 107–09 (Pa. 1993) (holding that admission of prior recorded testimony of an unavailable witness, that implicated defendant and exculpated the codefendant, was reversible error given the only justification for jury’s verdict was that they disbelieved codefendant’s testimony and at same time used witness’s prior recorded testimony against defendant, despite trial court’s instructions not to do so).
 - Majority: Justice Papadakos, joined by Justice Larsen, Justice Flaherty, Justice Zappala & Justice Cappy
 - Concurring in the result: Chief Justice Nix
 - Justice McDermott did not participate in the decision of this case.
- *Commonwealth v. Hess*, 617 A.2d 307, 315 (Pa. 1992) (determining that state forfeiture statute violates article I, section 9 “insofar as it applies to the payment of attorney’s fees for legitimate criminal defense representation prior to conviction,”—not any federal constitutional provision).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Flaherty & Justice Cappy
 - Justice Larsen & Justice Papadakos did not participate in the consideration or decision of this matter.
 - Justice McDermott did not participate in the decision of this matter.
- *Commonwealth v. Ludwig*, 594 A.2d 281, 281–82, 285 (Pa. 1991) (use of closed-circuit television to transmit child’s testimony violated defendant’s article I, section 9 right to a “face to face” confrontation, choosing not to follow the U.S. Supreme Court in *Maryland v. Craig*), *superseded by constitutional amendment*, PA. CONST. art. V, § 10(c); 2003 Pa. Laws 459.
 - Majority: Justice Zappala, joined by Justice Larsen, Justice Papadakos & Justice Cappy

- Concurring in part and dissenting in part: Justice McDermott
- Dissent: Chief Justice Nix, joined by Justice Flaherty
- Dissent: Justice Flaherty, joined by Chief Justice Nix
- Commonwealth v. Lohman, 594 A.2d 291, 292 (Pa. 1991) (follows *Ludwig*, holding that the use of closed-circuit testimony violates defendant's face-to-face confrontation right under article I, section 9).
 - Majority: Justice Zappala, joined by Justice Larsen, Justice Papadakos & Justice Cappy
 - Concurrence: Justice Flaherty
 - Concurring in part and dissenting in part: Justice McDermott
 - Dissent: Chief Justice Nix
- Commonwealth v. Africa, 569 A.2d 920, 921, 926 (Pa. 1990) (holding that twenty-seven-month delay between arrest and trial violated speedy trial rule under both Federal and Pennsylvania Constitutions).
 - Majority: Justice Papadakos, joined by Chief Justice Nix, Justice Flaherty & Justice Zappala
 - Dissent: Justice Larsen
 - Dissent: Justice McDermott
- Commonwealth v. Green, 581 A.2d 544, 564 (Pa. 1990) ("The inability of Appellant to cross-examine this inmate was particularly blatant error here because Appellant's right to confront and cross-examine witnesses against him, as guaranteed by the Sixth Amendment and Article 1, Section 9, of the Pennsylvania Constitution, was effectively denied.")
 - Majority: Justice Papadakos, joined by Justice Larsen, Justice Flaherty & Justice McDermott
 - Concurring in the result: Chief Justice Nix & Justice Zappala
- D'Elia v. Pa. Crime Comm'n, 555 A.2d 864, 872 (Pa. 1989) (holding that statutory use and derivative use immunity granted individual subpoenaed to appear before Pennsylvania Crime Commission was not coextensive with state constitutional protection against self-incrimination).
 - Majority: Justice Zappala, joined by Chief Justice Nix, Justice Larsen, Justice Flaherty, Justice McDermott, Justice Papadakos & Justice Stout
 - Concurrence: Justice Papadakos, joined by Chief Justice Nix, Justice Flaherty & Justice McDermott

- Commonwealth v. Lloyd, 567 A.2d 1357, 1359 (Pa. 1989) (“We now hold under the confrontation clause of the Pennsylvania Constitution, that the appellant in the instant action was denied his right to confrontation when his attorney was denied access to the contents of the victim’s psychotherapeutic records.”).
 - Majority: Justice McDermott, joined by Chief Justice Nix, Justice Flaherty & Justice Zappala
 - Dissent: Justice Larsen, joined by Justice Papadakos
 - Former Justice Stout did not participate in the decision of this case.
- Commonwealth v. Uhrinek, 544 A.2d 947, 948 (Pa. 1988) (“Because the trial court excluded evidence of the intoxication of the deceased pedestrian, which was relevant to appellant’s theory of the cause of the accident, we reverse his homicide by vehicle conviction and remand for a new trial.”).
 - Majority: Justice Stout, joined by Chief Justice Nix, Justice Flaherty & Justice Zappala
 - Dissent: Justice Larsen
 - Dissent: Justice Papadakos, joined by Justice McDermott
- Commonwealth v. Evans, 512 A.2d 626, 631 (Pa. 1986) (holding that pursuant to article I, section 9, the defendant should have been allowed to cross-examine the Commonwealth’s key witness about other charges then pending against witness, not just his role in crime in question, and error in restricting scope of cross-examination of key witness was not harmless).
 - Majority: Justice Flaherty, joined by Chief Justice Nix, Justice Larsen, Justice McDermott & Justice Zappala
 - Concurrence: Justice Papadakos
 - Dissent: Justice Hutchinson
- Commonwealth v. Majorana, 470 A.2d 80, 81, 85 (Pa. 1983) (interpreting Rape Shield Law in light of article I, section 9 to admit evidence that offers an explanation of an alternative account of alleged rape, given an accused’s fundamental right to present in defense his own version of the facts).
 - Majority: Hutchinson, joined by Chief Justice Roberts, Justice Flaherty & Justice Zappala
 - Concurring specially: Justice McDermott
 - Concurring in the result: Justice Nix
 - Dissent: Justice Larsen
- Commonwealth v. Turner, 454 A.2d 537, 540 (Pa. 1982) (“[W]e decline to hold, under the Pennsylvania Constitution, that the existence of *Miranda* warnings, or their absence, affects a

- person's legitimate expectation not to be penalized for exercising the right to remain silent.”).
- Majority: Justice Flaherty, joined by Chief Justice O'Brien, Justice Roberts & Justice Larsen
 - Dissent: Justice Nix
 - Dissent: Justice McDermott, joined by Justice Hutchinson
 - Commonwealth v. Pounds, 417 A.2d 597, 603 (Pa. 1980) (holding that the trial court's refusal of a request to instruct the jury on the defense of alibi was reversible error and sufficient prejudice to require a new trial).
 - Majority: Chief Justice Eagen, joined by Justice O'Brien, Justice Roberts, Justice Nix & Justice Flaherty
 - Dissent: Justice Larsen, joined by Justice Kauffman
 - Commonwealth v. Rolon, 406 A.2d 1039, 1040 (Pa. 1979) (“We agree with appellant that the court of common pleas deprived appellant of his right of compulsory process by accepting the unsupported claim of privilege against self-incrimination of appellant's witness.”).
 - Majority: Justice Roberts, joined by Chief Justice Eagen, Justice O'Brien & Justice Larsen
 - Dissent: Justice Nix
 - Justice Manderino did not participate in the consideration or decision of this case.
 - Commonwealth v. Frazier, 369 A.2d 1224, 1228, 1230 (Pa. 1977) (defendant's right to be tried by an impartial jury, as guaranteed by the Sixth Amendment and by article I, section 9, was violated because the nature of the pretrial publicity was such that one exposed to it would be unable to serve as an impartial juror, and virtually every prospective juror in the county was exposed to it).
 - Majority: Justice Manderino, joined by Justice Eagen, Justice Roberts & Justice Pomeroy
 - Concurring in the result: Justice O'Brien
 - Dissent: Justice Nix
 - Chief Justice Jones did not participate in the consideration or decision of this case.
 - Commonwealth v. Brenizer, 356 A.2d 784, 785 (Pa. 1976) (determining that comments made by the district attorney “as to possible ‘explanations’ of appellant's plea of not guilty, when coupled with the fact that appellant did not take the stand or offer any evidence in defense, constitutes impermissible and prejudicial comment on appellant's Fifth Amendment

2018]

STILL LIVING

451

- right . . . and Art. I, s[ection] 9 . . . not to have any adverse comment on his not taking the witness stand”).
- Majority: Justice O’Brien, joined by Chief Justice Jones, Justice Eagen, Justice Roberts, Justice Nix & Justice Manderino
 - Dissent: Justice Pomeroy
 - Commonwealth v. Whitaker, 359 A.2d 174, 175, 177 (Pa. 1976) (construing Rule of Criminal Procedure, which requires that trial commence within 270 days of a complaint, to affirm trial court’s dismissal of all charges, despite contention that entry of nolle prosequi tolled running of 270-day time period specified by rule).
 - Majority: Justice Manderino, joined by Chief Justice Jones, Justice O’Brien, Justice Roberts, Justice Pomeroy & Justice Nix
 - Concurring in the result: Justice Eagen
 - Commonwealth v. Roundtree, 364 A.2d 1359, 1364 (Pa. 1976) (defendant was deprived of effective assistance of counsel when defense counsel failed to raise pretrial motion asserting his speedy trial claim without any reasonable strategic basis to not do so).
 - Majority: Chief Justice Jones, joined by Justice Eagen, Justice O’Brien, Justice Roberts, Justice Pomeroy, Justice Nix & Justice Manderino
 - Commonwealth v. Triplett, 341 A.2d 62, 64 (Pa. 1975) (“[A]ny statement of a defendant declared inadmissible for any reason by a suppression court cannot be used for the purpose of impeaching the credibility of a defendant who elects to testify on his own behalf at trial.”), *superseded by constitutional amendment* PA. CONST. art. 1, § 9 (1984).
 - Majority: Justice O’Brien, joined by, Justice Nix & Justice Manderino
 - Concurrence: Justice Pomeroy
 - Concurring in the result: Justice Roberts
 - Dissent: Chief Justice Jones
 - Dissent: Justice Eagen
 - *In re Silverberg*, 327 A.2d 106, 113 (Pa. 1974) (holding that use of prior claim of privilege against self-incrimination during a disciplinary proceeding, which raised impermissible inference of inconsistency in testimony of two of the subjects, required reversal and new disciplinary hearing at which no use of prior claim of privilege against self-incrimination would be permitted).

- Majority: Justice Roberts, joined by Justice Eagen, Justice O'Brien, Justice Nix & Justice Manderino
- Concurrence: Justice Nix, joined by Justice Roberts
- Dissent: Chief Justice Jones, joined by Justice Pomeroy
- Dissent: Justice Pomeroy, joined by Chief Justice Jones
- Commonwealth v. Williams, 327 A.2d 15, 15, 18 (Pa. 1974) (three-and-a-half-year delay between arrest and trial denied defendant his constitutionally guaranteed right to speedy trial).
 - Majority: Justice Roberts, joined by Justice Pomeroy, Justice Nix & Justice Manderino
 - Concurring in the result: Justice Eagen & Justice O'Brien
 - Chief Justice Jones did not participate in the consideration or decision of this case.
- Commonwealth v. McCloud, 322 A.2d 653, 656 (Pa. 1974) (holding the use of an autopsy report in the absence of the medical examiner who made the autopsy, used "as direct evidence in establishing the Cause of death (an element of the crime) denied appellant the fundamental constitutional right of confrontation").
 - Majority: Justice Roberts, joined by Justice O'Brien, Justice Nix & Justice Manderino
 - Concurring in the result: Chief Justice Jones, Justice Eagen & Justice Pomeroy
- Commonwealth v. Davis, 305 A.2d 715, 720–21 (Pa. 1973) (holding prosecutor's persistent references in his closing argument, over objection, to evidence against defendant being "uncontroverted" violated defendant's rights against self-incrimination where he did not testify and offered no other witnesses or evidence at trial).
 - Majority: Justice Roberts, joined by Justice O'Brien
 - Concurrence: Justice Pomeroy
 - Concurring in the result: Justice Eagen
 - Dissent: Chief Justice Jones
- Commonwealth v. Dixon, 311 A.2d 613, 613–15 (Pa. 1973) (reading Rule 118 with Rule 119, where the preliminary arraignment is meant to guarantee a citizen the same rights to which he is entitled under the Pennsylvania Constitution).
 - Majority: Justice Manderino, joined by Justice O'Brien, Justice Roberts & Justice Nix
 - Dissent: Justice Pomeroy, joined by Chief Justice Jones & Justice Eagen
- Commonwealth v. Hamilton, 297 A.2d 127, 128, 133 (Pa. 1972) (defendant was denied right to a speedy trial under both federal

2018]

STILL LIVING

453

and state constitutions when almost six years passed from when the authorities lodged a detainer against him to when he petitioned to dismiss the indictment).

- Majority: Justice Nix, joined by Chief Justice Jones, Justice Eagen, Justice O'Brien, Justice Roberts, Justice Pomeroy & Justice Manderino
- *Commonwealth v. Dillworth*, 246 A.2d 859, 861–62 (Pa. 1968) (construing statute to determine the legislature never intended to authorize a determination of paternity by a judge alone, to avoid analysis of article I, sections 6 “and/or” 9, the right of jury trial).
 - Majority: Justice O'Brien, joined by Chief Justice Bell, Justice Cohen & Justice Eagen
 - Concurrence: Justice Roberts
 - Concurring: Chief Justice Bell & Justice Cohen
 - Dissent: Justice Musmanno & Justice Jones

C. PA. Const. Art. I, § 10 [Double Jeopardy]

- *Commonwealth v. Ball*, 146 A.3d 755, 759, 770 (Pa. 2016) (defendant could not be retried in court of common pleas after being acquitted by magisterial district judge for a driving under influence charge under the double jeopardy clauses of the U.S. and Pennsylvania Constitutions: The Fifth Amendment and article I, section 10 respectively).
 - Majority: Justice Wecht, joined by Chief Justice Saylor, Justice Todd, Justice Donohue & Justice Dougherty
 - Concurrence: Justice Wecht (writing separately to offer response to concerns voiced in the dissent)
 - Dissent: Justice Baer
- *Commonwealth v. States*, 938 A.2d 1016, 1026–27 (Pa. 2007) (holding double jeopardy and collateral estoppel barred the Commonwealth from retrying defendant on homicide and other charges, and that the Commonwealth's constitutional right to a jury trial under article I, section 6 is not violated by so holding).
 - Majority: Justice Fitzgerald, joined by Chief Justice Cappy & Justice Baldwin
 - Concurrence: Justice Saylor (joins majority opinion except for n.8)
 - Dissent: Justice Castille, joined by Justice Baer
 - Dissent: Justice Eakin
- *Commonwealth v. Gibbons*, 784 A.2d 776, 779 (Pa. 2001) (holding that the verdict of acquittal entered by the municipal court

- constituted an acquittal for double jeopardy purposes, thus barring the state's appeal).
- Majority: Justice Nigro, joined by Justice Flaherty, Justice Zappala, Justice Saylor & Justice Cappy
 - Concurrence: Justice Saylor
 - Dissent: Justice Castille
 - Justice Newman did not participate in the consideration or decision of this case.
- *Commonwealth v. Martorano*, 741 A.2d 1221, 1223 (Pa. 1999) (retrying defendants after they were granted a new trial on the ground of pervasive prosecutorial misconduct would violate double jeopardy clause).
 - Majority: Justice Newman, joined by Chief Justice Flaherty, Justice Zappala & Justice Cappy
 - Dissent: Justice Saylor, joined by Justice Castille & Justice Nigro
 - *Commonwealth v. Comer*, 716 A.2d 593, 594, 599 (Pa. 1998) (defendant's convictions and sentences for involuntary manslaughter and homicide by vehicle, based upon same conduct that caused a single death, violated state and federal double jeopardy clauses).
 - Majority: Justice Zappala, joined by Chief Justice Flaherty, Justice Cappy & Justice Nigro
 - Dissent: Justice Castille, joined by Justice Newman
 - *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992) ("Because the prosecutor's conduct in this case was intended to prejudice the defendant and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial.").
 - Majority: Justice Flaherty, joined by Chief Justice Nix, Justice Zappala, Justice Papadakos & Justice Cappy
 - Justice Larsen did not participate in the consideration or disposition of this case.
 - Justice McDermott did not participate in the disposition of this case.
 - *Commonwealth v. Goldhammer*, 489 A.2d 1307, 1316 (Pa. 1985) (defendant who, through successful appeal, had some of his convictions vacated on ground that counts were barred by statute of limitations, could not be resentenced to increased terms on his remaining convictions without violating double jeopardy

2018]

STILL LIVING

455

- clauses), *rev'd sub nom.* *Pennsylvania v. Goldhammer*, 474 U.S. 28 (1985).
- Majority: Chief Justice Nix, joined by Justice Larsen, Justice Flaherty, Justice Hutchinson, Justice Zappala & Justice Papadakos
 - Dissent: Justice McDermott
 - *Borough of West Chester v. Lal*, 426 A.2d 603, 606 (Pa. 1981) (holding that Commonwealth Court's order subjected defendant to double jeopardy in violation of both the federal and state constitutions).
 - Majority: Justice Larsen, joined by Chief Justice O'Brien, Justice Flaherty & Justice Kauffman
 - Concurrence: Justice Roberts
 - Concurring in the result: Justice Nix
 - *Commonwealth v. Hude*, 425 A.2d 313, 320, 326–27 (Pa. 1980) (construing section 110(2) narrowly to comport with constitutional double jeopardy requirements, but holding that as applied to the instant case, the question of defendant's credibility was litigated so as to prevent relitigation of that issue).
 - Majority: Justice Nix
 - Concurring in part: Chief Justice O'Brien, Justice Roberts & Justice Flaherty
 - Chief Justice O'Brien & Justice Larsen concurring in the result as to the first defendant.
 - Justice Larsen concurring in the result as to further prosecution of the second defendant.
 - Justice Flaherty, Chief Justice O'Brien & Justice Roberts concurred in part and dissented in part as to second defendant.
 - *Commonwealth v. Tome*, 398 A.2d 1369, 1377 (Pa. 1979) (holding that increase in sentence on murder indictment constituted double jeopardy).
 - Majority: Justice O'Brien, joined by Chief Justice Eagen, Justice Roberts & Justice Manderino
 - Dissent: Justice Nix
 - Dissent: Justice Larsen
 - *Commonwealth v. Peluso*, 393 A.2d 344, 346–47 (Pa. 1978) (double jeopardy clause of both constitutions was violated when defendant's prior trial had resulted in a determination that there was no evidence to prove he knew or had reason to know that a certain rifle was in fact stolen, but second trial resulted in a conviction from the same facts).

- Majority: Justice O'Brien, joined by Chief Justice Eagen, Justice Roberts, Justice Pomeroy, Justice Nix, Justice Manderino & Justice Larsen
- Commonwealth v. Brown, 314 A.2d 506, 507, 509 (Pa. 1974) (finding that the court's amendment to defendant's sentence three days later, increasing the maximum term to 20 years (compared to his original 8.5–10 years) violated the double jeopardy clause), *overruled by* Commonwealth v. Jones, 554 A.2d 50 (Pa. 1989).
 - Majority: Chief Justice Jones, joined by Justice Roberts, Justice O'Brien, Justice Manderino, Justice Eagen & Justice Pomeroy
 - Concurrence: Justice Roberts, joined by Justice O'Brien & Justice Manderino
 - Concurring part and dissenting in part: Justice Nix
- Commonwealth v. Lee, 312 A.2d 391, 394 (Pa. 1973) (defendant could not be sentenced for a crime for which he was not indicted without proper notice pursuant to article I, section 10).
 - Majority: Justice Manderino, joined by Chief Justice Jones, Justice Eagen, Justice O'Brien, Justice Robert, Justice Pomeroy & Justice Nix
 - Concurrence: Justice Eagen, joined by Chief Justice Jones & Justice O'Brien
- Commonwealth v. Campana, 304 A.2d 432, 434 (Pa. 1973) ("All charges resulting from the criminal 'episode' of each appellant should have been consolidated at one trial, and consequently the second prosecutions violated the Double Jeopardy Clause" of the federal and state constitutions).
 - Majority: Justice Roberts, joined by Justice Eagen, Justice Jones, Justice Nix & Justice Barbieri
 - Concurrence: Justice Eagen, joined by Chief Justice Jones
 - Concurrence: Justice Nix
 - Dissent: Justice Pomeroy
 - Chief Justice Bell & Justice Roberts absent in No. 21.